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Joel Parker

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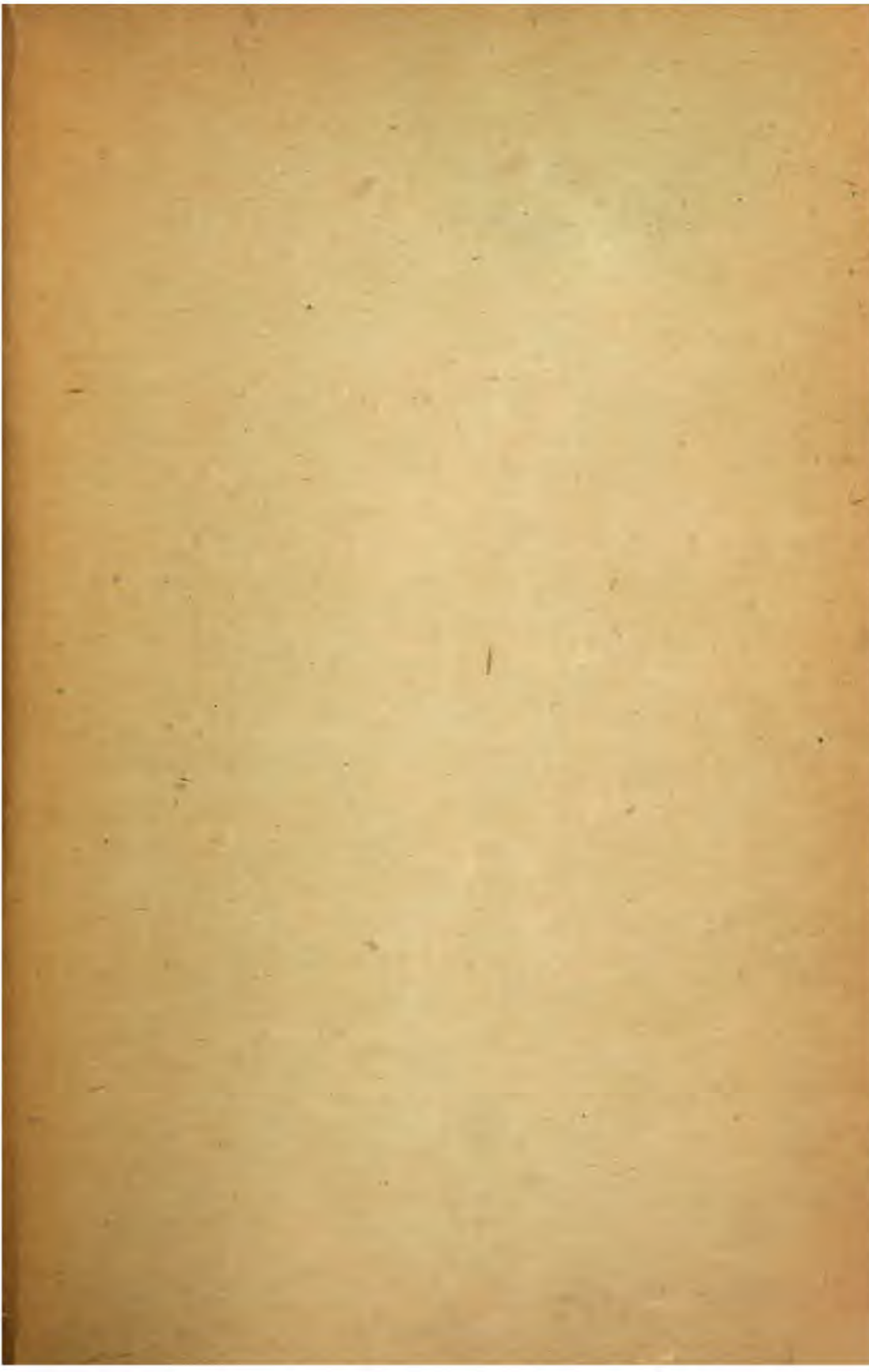
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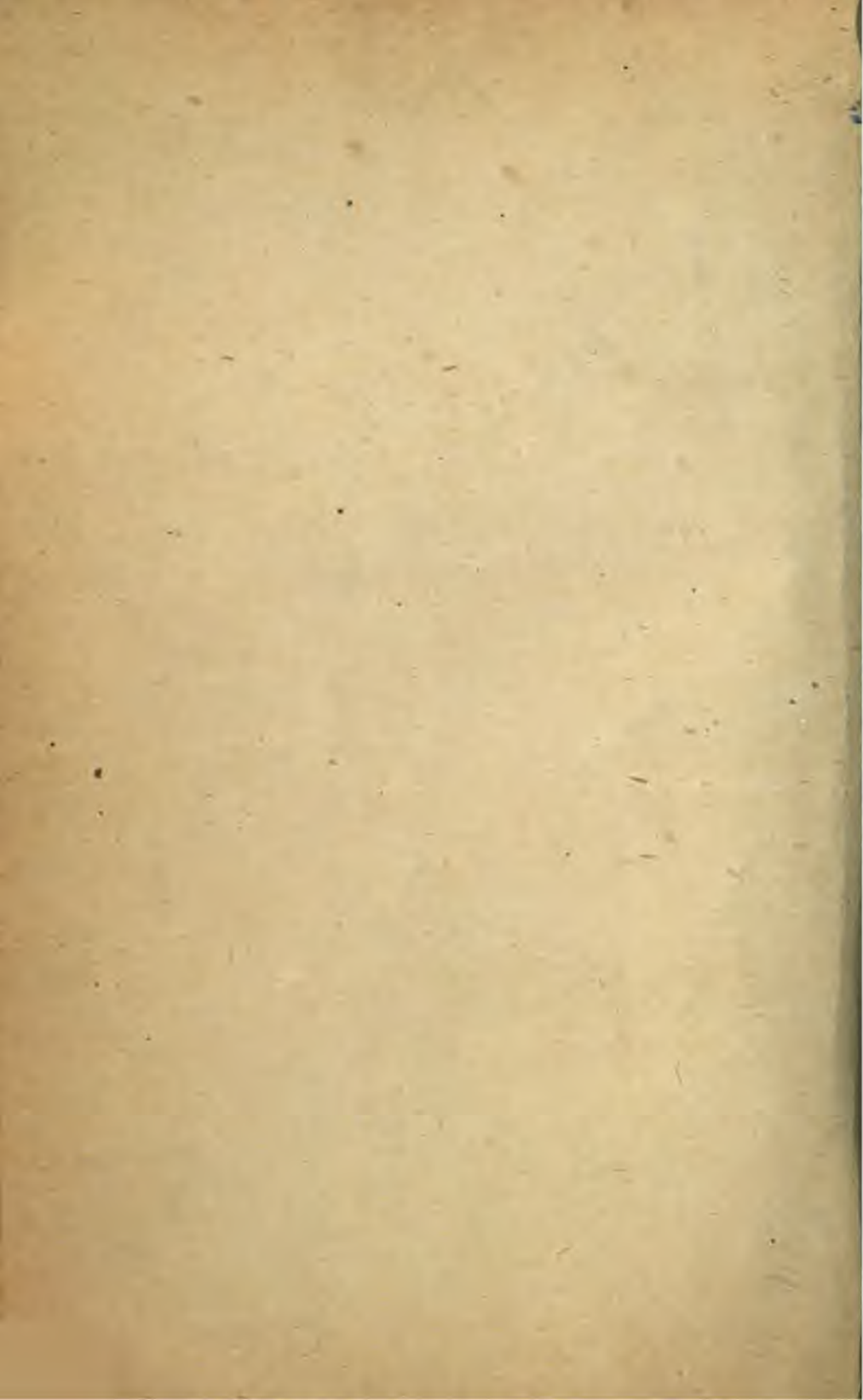


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*Parker, J. W., 1795-1870.*

*1 cop. b.d.*

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J. W. PARKER'S

C H A R G E, &c.

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©  
A  
**CHARGE**

TO THE

**GRAND JURY,**

UPON

**THE IMPORTANCE OF MAINTAINING THE  
SUPREMACY OF THE LAWS;**

WITH A

**BRIEF SKETCH OF THE CHARACTER**

OF

**WILLIAM M. RICHARDSON,**

LATE CHIEF JUSTICE OF THE

**SUPERIOR COURT OF NEW-HAMPSHIRE.**

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**BY JOEL PARKER.**

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• **CONCORD, N. H.**

**MARSH, CAPEN & LYON.**

**1838.**





1843, Feb. 6.  
Gift of  
Rev. Luther Hamilton,  
of Concord, N. H.

**NOTE.** The following Charge was delivered to the Grand Jury in the county of Rockingham, February term, 1838, and a copy was requested for the press by the Bar and the Grand Jury, but its publication was not then deemed expedient.

It was again delivered at April term, in the county of Cheshire, together with a Sketch of the Character of the late Chief Justice RICHARDSON, then recently deceased; and a copy having been requested by the Bar in that county—in accordance with the wishes thus expressed, the whole is now submitted to the public.

**KEENE, MAY, 1838.**

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**ASA M'FARLAND, PRINTER.**

## CHARGE, &c.

*Gentlemen of the Grand Jury:*

WHEN the pilgrim fathers had accomplished the perilous voyage which they had undertaken that they might enjoy liberty of conscience and equal rights, and had arrived upon the coast of New England—while they were tossing upon the billows near an almost unknown shore, and before they had attained a foothold upon the soil which was to be their home and their country—they drew up and subscribed a compact, setting forth, that they did solemnly and mutually, in the presence of God, and one another, covenant and combine themselves into a civil body politic, and by virtue thereof did enact, constitute and frame such just and equal laws, ordinances, &c., from time to time, as should be thought most meet and convenient for the general good of the colony, to which they promised all due submission and obedience.

This compact, thus made on board the *May Flower*, November 11, 1620, exhibits the wisdom and prudence of the emigrants who first settled upon the shores of New England—is the germ of its civil government—and presents a spectacle which may be contemplated with pride and satisfaction.

After being crowded together within the confines of a small ship—after being tossed, in this situation, upon a tempestuous ocean, during a voyage of several months—when they had at last arrived on the coast, at an inclement season, they might well have been pardoned, had they hastened from shipboard, and proceeded to provide for their immediate personal wants, leaving compacts of civil government, and

promises of submission and obedience to the laws, to follow the erection of dwellings in which to shelter themselves, and their wives and children, from the dangers of the ocean, and the storms of an approaching winter upon a then barbarous shore.

Such, however, was not the character of the fathers of New England ; and we read in the document to which I have referred, that devotion to law and order which so eminently characterized them, and which can hardly with propriety be called second to their attachment to religion, so uniformly did they accompany each other, and so intimately were they intertwined together.

The early laws they passed exhibit the same attachment to a well regulated civil polity.

If, perchance, it be found that all the enactments of our ancestors were not framed upon principles of universal toleration, that was the fault of the age in which they lived, and finds great extenuation from the circumstances in which they were placed. They could not be expected to rise at once above all the opinions with which they had been conversant ; and having contended strenuously for liberty to worship God according to the dictates of their own consciences, and having done and suffered so much to accomplish this great object, it is not strange that they should have been impatient of interruption from those whose tenets and doctrines they could not regard with favor, or believe to be according to the holy scriptures.

But amid every thing in their character and conduct to which the present age, with its flood of additional light, may take exception, it will not be denied that they are entitled to the commendation of a great regard for a due administration of law ; and the spirit which, on board the May Flower, formed the compact promising to give all due submission and obedience to such just and equal laws and ordinances as should from time to time be thought meet and convenient for the general good, pervaded in an eminent degree the con-

stantly increasing community, of which the emigrants in that vessel were the hardy pioneers.

If their laws cannot in all cases be commended, the disposition of the people to abide by and enforce them may well be considered as worthy of all praise. Even the turbulent spirits who had fled from salutary restraint in the eastern hemisphere, and who brought with them habits wholly at variance with the civil and religious polity of the infant colony, had no reason to complain of restraint by unlawful violence, or of summary vengeance, taken without warrant of law, even for notorious misdeeds.

With such regard for civil institutions, as well as religious ordinances, the colony, originating with a handful of emigrants, grew and prospered.—A benignant Providence smiled upon them, and they became a numerous people.

When at a subsequent date the oppression of the crown was no longer to be borne, and the colonies arose in their might to shake off a grievous political servitude, we find the prominent reasons for the change to be—the refusal of the king to assent to laws, the most wholesome and necessary for the public good, thereby obstructing the administration of justice—that he had deprived the people in many cases of trial by jury—had taken away charters—abolished most valuable laws—and committed outrages of divers descriptions, upon persons and property :—and when the independence of the country was achieved, the constitutions adopted by the several states—the confederation of the whole—and their final union by means of the federal constitution—attest the ardent attachment to a government of law which so eminently characterized those whose patriotism had brought the great struggle to a successful issue.

These constitutions generally provide, in substance, that every individual has a natural and unalienable right to worship God according to the dictates of his own conscience—that the liberty of the press ought inviolably to be preserved

—that every citizen ought to be secure from all unreasonable seizures of his person and possessions, and that none therefore be made without warrant—that he shall be entitled to a remedy for all injuries to his person, property and character—that no person ought to be held to answer for any crime or offence until he is duly informed of the accusation—that each one has a right to produce his witnesses, and be heard in his defence—and that he shall not be arrested, imprisoned, despoiled of his property, immunities, or privileges, or deprived of life, liberty or estate, but by the judgment of his peers or the law of the land.

And, in accordance with the principles upon which free governments must be founded, the laws have from time to time provided for securing to the citizens, and all who live under the government, life, liberty, and property—denouncing upon offenders penalties deemed adequate to the measure of their offences, but, at the same time, purporting to ensure, in the most ample manner, the constitutional liberty of the citizen ; his right to a fair and impartial trial for all alleged offences, by a jury of his peers ; and giving, even to the condemned criminal, opportunity to offer whatever he may have to say in extenuation, for the purpose of mitigating the sentence, or procuring a pardon.

The love of freedom, and reverence for law, which characterized our fathers, are professed by their sons ; and upon all occasions of national rejoicing we are in the habit of setting forth—among our other claims to national preëminence—that our country is the asylum of the oppressed—that here no arbitrary will of a despot can interfere with the personal liberty of the citizen, or wrest from him the fruits of his industry—that the freedom of speech, and of the press, are rights guarded and secured by constitutional barriers—that this land is emphatically that earthly paradise where every one may sit under his own vine and fig tree, with none to molest or make him afraid—that the law,

with a broad shield, covers the citizen from injury; or failing in that, furnishes him adequate redress for all attacks upon his person, reputation, or property—that equal and exact justice is provided for all—and, that the population, more intelligent than any other upon the face of the earth, exhibit that love of peace, good order, and justice, and that power and capacity for self government, which furnish a perfect guarantee of our future prosperity and onward march in the career of national greatness.

And not content with expatiating upon the intelligence, freedom, and general preëminence of our country, in the present tense, we call upon Time to yield us a century or two in advance, in which our predictions of future greatness and glory may be restrained only by the poverty of our language and our imaginations.

Pretensions of this character are lavishly put forth, not merely from legislative halls, and from the rostrums erected upon the return of our national anniversaries, but they are borne on every breeze from pulpits and lyceums, and scattered broad cast over the land by quarterly, and monthly, and weekly, and daily publications.

Not only have we gloried in the security and happiness conferred on ourselves, by the introduction of civil liberty, but we have extended a generous sympathy to the less fortunate.

How many lamentations have been uttered for the degraded condition of other nations, deprived of freedom of thought and action by despotic institutions—by the subjugation of the mind and will of the great mass of the people, to the will of one or a few individuals? How many predictions have foretold the glorious condition of the nations of the earth, when, in obedience to the impetus of our revolutionary struggle, and following the example of our forefathers, they shall burst the fetters that bind them, and emerge from the darkness of despotism to the clear light of of civil, intellectual, and religious liberty?



Happy, thrice blessed are we as a people, if the faith we have thus professed is the rule of our practice. If we can substantiate our title to the commendations which we bestow upon ourselves for the existing state of our social and civil conduct—if we are truly verifying and maintaining our theoretical regard for right and justice—if all that is claimed in praise of the age that is passing be founded in truth—the anticipations of our onward progress in the path of national glory and renown may well be deemed neither over sanguine, or arrogant.

There can be no fairer spectacle of civil government than that of a nation whose fundamental principles guarantee to all citizens freedom of thought and opinion, of speech and publication, subject only to the salutary restraint of being holden to answer for any matter put forth in violation of law—whose institutions prevent, as far as human institutions may, all oppression, and aggression; and where prevention is impossible, furnish a sure and certain remedy for all violations of right, by a resort to the ordinary tribunals—whose laws protect the person and property of every individual within the pale of their jurisdiction, from illegal search and seizure; and secure him a fair and impartial trial, with the right of being fully heard in his defence upon any matter alleged against him—and whose citizens stand side by side ready to sustain the majesty of the law, require obedience to its commands, and enforce its enactments; and are willing and desirous to aid those who may be injured and aggrieved, in obtaining right and justice, “freely, without being obliged to purchase it, completely, and without denial, promptly and without delay, conformably to the laws.”

But to what part of these United States shall we look for the practical exemplification of these principles?

How many evils exist in the community, which are not restrained by statutory regulation, simply because the moral sense of the people is not sufficiently strong to enforce the prohibitions, should the legislature enact them? How

often is it said that it is useless to legislate, because the law, if made, will be inoperative? How fully in many cases is this objection sustained? How many laws now lie a dead letter in the statute books of our own and other states, because it would be unpopular should an attempt be made to carry them into execution? How often do we hear it proclaimed by individual citizens; and by the public press, that some particular enactment is, and will be disregarded?

Nay, in what portion of our land shall we find law uniformly triumphant—a regular resort to the due course of the administration of justice—and the citizens refraining from violence, and sustaining the constituted authorities in prosecuting and punishing all infractions of the laws they profess to revere?

Shall we go to Vicksburg?—We stand by a gallows recently erected—we behold several individuals led forth, and the highest penalty of the law inflicted, by hanging them until they are dead; and all this deliberately done, in the face of the community, not only without warrant, but in violation of the express provisions of the law.

In other words, we see a cold-blooded, deliberate murder perpetrated, and the form of legal punishment resorted to, as if in defiance of the ministers of justice, and in mockery of its sanctions. It is alleged that the sufferers were gamblers—that their characters were vile—and that they had been guilty of great atrocities. If this were so, could not the laws punish? If the fact was known, could not the proof be made before a judicial tribunal?

Their accomplices would perhaps commit perjury to screen them from punishment; but could not a jury discriminate between the true and the false, as well as a mob.

Grant, however, that they were as guilty as their executioners have alleged—Had not the laws prescribed the proper measure of their punishment? Death is not the usual penalty for gambling. If they had committed other offences,

could not the people sustain the constituted tribunals in inflicting the prescribed sentence, as well as sustain a mob in committing murder? But how many of those who participated in that atrocious act have ever been arraigned at the bar of justice?

Shall we visit the streets of Baltimore?—An unlawful assemblage is assailing the houses of bank directors. It is alleged that they have conducted fraudulently in the management of the bank. The doors are forced. The inmates fly for their lives. The furniture is broken up and destroyed, and the interior demolished. A single company of militia would have served to quell the riot, but the authorities look on, almost without effort, until the work of destruction is accomplished. And when the injury is complete—when the judgment of the mob has been thus signally executed by wanton destruction, the excitement passes by—an investigation of the affairs of the bank is had—and the suffering directors are completely exonerated. How many of those engaged in the perpetration of that outrage have ever been brought to punishment?

Shall we take our station on Bunker-hill? Shall we stand near the spot, where, a little more than half a century since, our fathers stood, shoulder to shoulder, contending against oppression, and pouring out their blood freely to secure equal rights?

The lurid flames arise, but it is not now burning Charlestown that attracts attention. They proceed from the peaceful walls of a convent; from which defenceless women and children have been driven forth, under shadow of the darkness, that the torch might be applied; and the building is left a smouldering ruin. The cemetery is burst open—the sanctity of the grave is violated—and petty larceny sneaks in, a companion of greater crimes: and of all those who

participated in that compound of larceny, burglary, arson and sacrilege, one poor boy alone suffers the penalty.

Let us change our position to the "far west".—The prison of St. Louis is broken open by a lawless multitude. An individual, there confined, is dragged forth and chained to a stake. The faggot is placed—the fire kindled—amid the screams and groans of the victim are heard the shouts of his executioners—and he is burned to death, and his ashes scattered to the four winds of heaven.

Do you exclaim that this act, so characteristic of the savage in his worst estate, must have been perpetrated by some band of marauding Indians? Oh, no! It was the act of inhabitants of a civilized city.

He is said to have been a murderer, but he was in safe custody. Would not the law have exacted its penalty? Could he have escaped the forfeit? There was no necessity that the people, to show their detestation of his crime, should commit precisely the same offence by murdering him.

Is it supposed that the law made a fearful example? That its violated majesty exacted a signal retribution, as a warning to others?

The judge of the circuit, in his next charge to the grand jury, told them it was clearly an act of murder in all concerned, but in his opinion whether the jury should act at all depended upon the solution of this preliminary question, namely, whether the destruction of the prisoner was the act of the '*few*' or the act of the '*many*.' That if, on a calm view of the circumstances, they should be of opinion that it was perpetrated by a definite, and, compared with the population of St. Louis, a *small* number of individuals, separate from the mass, and evidently taking upon themselves, as contradistinguished from the multitude, the responsibility of the act; his opinion was that they ought to indict them without a single exception. If, on the other hand, the de-

struction was the act of the many—of the multitude, in the ordinary sense of those words—"not the act of numerable and ascertainable malefactors, but of congregated thousands, seized upon and impelled by that mysterious metaphysical and almost electric phrensy" (I quote the words) "which in all ages and nations has hurried on the infuriated multitude to deeds of death and destruction"—then he advised them to act not at all in the matter—the case then transcended the jurisdiction of the grand jury, and was beyond the reach of human law. With this exposition of the law and encouragement to let the offenders escape, you will not be surprised to learn that none were indicted.

The press which was denounced in the same charge is shortly after driven from St. Louis. It makes a stand upon the other side of the Mississippi, and is there destroyed. Another shares the same fate. Still another is procured and preparations made for its defence. The assault commences. Shots are fired. The editor falls. The besieged yield and flee. The press is broken up. And the grand jury indict ——— *the defenders of it!*

We may have different views of the prudence of those who persevered in attempting to publish what gave offence to others. We may, or may not, think it would have been better to yield an undoubted right, than to contend for it. But what must be the opinion of all in relation to the power and influence of mobs, and the imbecility of the law, or the pusillanimity, or corruption of those who are appointed to execute it, when we read an indictment, against the *party attacked*, setting forth that the respondents "unlawfully, 'riotously, routously, and in a violent and tumultuous manner, defended and resisted an attempt, (then are there being 'made by divers persons to the jurors unknown,) to break 'up and destroy a printing press, then and there being found"—or, as is stated in the second count, "unlawfully, riotously,

‘routously, and in a violent and tumultuous manner, defended, and resisted an attempt, (then and there being made by divers persons to the jurors unknown,) to force open and enter the store house of Benjamin Godfrey and W. S. Gilman, contrary to the form of the statute in such case made and provided, and against the dignity of the people of the state of Illinois.’

I quote from the language of the indictment as published, and were the subject matter of a nature to admit of it, we might be amused with the ludicrous idea of a statute of the state forbidding any one upon pain of indictment from resisting illegal violence, and outrageous assault, except in the most quiet and easy manner, and with such courtesy and gentleness that there should be no disturbance. But the occasion is too severe for us to entertain images of this kind. It exhibits a spectacle of law, not only prostrate by violence, but thereupon becoming subservient to it, and abjectly lending itself to the persecution of those who escaped with life from the infuriated attack.

Do you, disheartened and disgusted with these exhibitions, seek again the soil of New-England. You have before you, upon the occasion of a slight collision between firemen and foreigners, in the streets of Boston, the sacking of tenement after tenement, occupied by those who had committed no other offence than being of the same nation with one of the contending parties.—And again the same streets exhibit to you a military company, organized by virtue of the laws of the state, and upon a day when these laws required it to appear for duty, assailed with missiles, and followed, unresisting, through the most populous parts of the city, in this violent and tumultuous manner, because, forsooth, they were Irishmen or the descendants of Irishmen.

Shall we leave these scenes of violence without our own



state, and, taking our stand within it, challenge an investigation upon our own soil?

Let me point you to the prison of Prescott—let me bring before you the assemblage there collected upon the day appointed for his execution. A reprieve relieves the prisoner for a time. Do the multitude rejoice that Time spares him a few moments more, before he enters the confines of Eternity—that if guilty, a little more space is granted for prayer and repentance—and that if insane, there is yet some hope that he may be saved from an ignominious death? Not so! They have assembled for the laudable purpose of witnessing his dying agonies—of seeing a fellow being suspended upon the gallows—and disappointment makes them outrageous. They surround the prison-house with oaths and imprecations, and an amiable wife—the daughter of the prison-keeper—feeble and timid from recent confinement, is probably the victim of this shameful outrage.

I might recal to your recollection other outbreaks of the same lawless spirit, but I forbear.

Do you shudder at these atrocities? I have selected only some of the most prominent and recent. They are but sketches of a few of the numerous instances of the spirit of misrule which have within a few years past stained the annals of our country, disgraced its institutions, and brought contempt upon its administration of justice.

The contemplation of communities where freedom of thought and action is repressed and extinguished by arbitrary mandates, must excite the sympathies of the philanthropist; and well may the patriot heart rejoice in the anticipation of the time when they shall burst their shackles, and stand forth the triumphant asserters and maintainers of the great principles of civil and social law and liberty; but if they are to shake off the tyranny of kings and potentates merely to be subjected to the despotism of mobs—if the

people are to escape from the laws of a despotic ruler to be the instruments of wanton violence themselves, or subjected to the arbitrary rule and vengeance of others, not only without, but against all law—it may well be doubted whether the prayers of the patriot can ascend for such freedom; whether in such case the condition of the world is to be improved by “breaking the bands of the oppressor, and letting the oppressed go free.”

The attempt of this nation to sustain the self government of the people must be regarded as an experiment, “the end of which is not yet.” The people have acquired the physical power to adopt their own mode of government—to frame and execute their own laws—to provide in an eminent degree for their own happiness. With this power, under the favor of Providence, they may attain an enviable preëminence.

But physical force, unless restrained by social order, may be but an instrument of wide spread desolation. The institutions of civil liberty—the freedom of thought and action—the happiness of the private hearth—and the privilege of the public altar—may be swept from among the people, and no vestige of such blessings remain, except upon the page of the historian who relates that such things were; unless this physical power is subjected to moral restraints and rules of legal action; unless the liberty of the citizen be a liberty regulated by laws, not only voluntarily enacted, but perseveringly enforced against all who may exhibit a disposition to violate them, whether that violation be by single individuals or by masses of men acting in concert.

Will it be said that the outrages to which I have referred, and others of a like character, were the acts of a few individuals, and that the community at large is not responsible? Comparatively few may have been actively engaged, but does the responsibility rest alone with them?

I have no disposition to depreciate my native land. I know the worth, intelligence and patriotism of the great body of my fellow citizens. But, are not the people in too many instances justly obnoxious to the charge of countenancing and encouraging the collection of the mob?

It is not necessary, to do this, that we should parade the streets, and sound the trumpet, or ring the alarm bell. It may be very effectually done, by declarations that a particular individual or body of men deserves to be mobbed—by assertions that something, not forbidden by law, ought not to be permitted—by predictions that it will certainly be put down. Prophecy often causes its own accomplishment, and one of the most approved modes of raising a mob is to predict its existence.

Have we done all we could, either in the way of prevention or punishment? We organize thief-detecting societies, with riders and runners, to follow the marauder who purloins his neighbor's horse, or robs his melon patch, and we rest not until sentence of condemnation is passed upon his offences. We denounce the miscreant who, single handed, in the darkness of night, robs the traveller of a few shillings on the highway. But our arms are palsied, and our hearts cold; and we have no energy of hand or voice when a large body of men apply the torch to a convent, or to a building where an obnoxious printing press is deposited;—and when a prison is assailed, and its inmate literally burnt at the stake, we are told that if it is the deed of the many—of the multitude—to do nothing, because it is a murder which transcends human jurisdiction.

Is it urged in extenuation of mobs, that they are but the effervescence of popular feeling, accomplishing what the law cannot reach; or that they exercise a salutary influence in repressing offences which could not otherwise be punished for want of proof?

If proper provision has not been made by law for the punishment of the transactions, whatever they are, which excite the community, let a resort be had to the legislature, which is clothed with full power to pass all such laws as may be necessary for the preservation of order and morals, and which can provide for inflicting a penalty having due proportion to the offence.

If it be answered, that the excitement may relate to matters in which the legislature is not disposed to interfere—the reply is cogent, and ready, that it cannot be proper for the citizens to repress or punish, by unauthorized violence, what the constituted authority has not seen fit to declare a crime.

If the legislature have already acted, and have provided for the punishment of offenders, and it be said that the punishment is inadequate to correct the evil; that body has power to increase the sanctions of its enactments, and there is no occasion to call in brute force to supply a deficiency of law.

If, however, it be admitted that the law has provided a sufficient penalty, but it be alleged, as it sometimes is, that it cannot be enforced, for want of sufficient proof; it immediately occurs to us to enquire what security there is for the citizen, if an unlawful assemblage of irresponsible individuals may act upon proof, or suspicions, admitted to be insufficient to influence the verdict of a jury? Shall we admit that idle rumor, or indefinite conjecture, may be substituted in the place of evidence, and facts; and that individuals, having banded together to inflict vengeance, may mete out such measure of punishment as the excitement of the hour, or the fury occasioned by opposition, may dictate, because, forsooth, it is difficult or impossible to produce evidence that an offence has been committed?

If the very want of proof of the offence is to be set up in justification or extenuation of summary punishment by

illegal violence, we are no longer entitled to boast ourselves as living under a government of law, for this is the very worst feature of despotism ; and whether it be the despotism of an absolute monarch, or an absolute mob, is immaterial—or rather the former is preferable, as subjection to one task-master is more endurable than subjection to many.

That mobs act without proof, and that the innocent are quite as likely to fall under their condemnation as the guilty, is but a single item of consideration. If the offence was clear, the punishment would rarely be proportioned to the demerit, on account of the excitement occasioned by numbers acting together, and vying with each other in their activity.

But the evil lies much deeper and broader than all this. They create a disregard of law, beyond the time and the occasion, and are schools in which men are trained to the commission of farther offences. There is not only the immediate action of the mob itself, and the practices, perjury perhaps included, resorted to for concealment ; but the impunity with which many escape, if any are brought to justice, destroys confidence in the action of the constituted tribunals. Others are encouraged to a violation of those laws which they have seen are inefficient in the punishment of offenders, and those who have entered the service as members of a company, are led on to set up business on private account.

The convent at Charlestown was attacked, not for the purpose of stealing, but to gratify some other desire ; and yet, when the conflagration raged, private theft abstracted many of the valuable articles it contained. I need not ask you whether those who there first stained their fingers with larceny are less likely to commit the crime again.

Since the conflagration of that edifice, incendiaries have spread destruction in Boston and its vicinity. How many of these fires were kindled by those who took their first lesson upon that memorable occasion, will never be known

upon earth; but is there not good reason to believe that many of them have originated either from those actively engaged in burning the convent, or from the impunity with which they escaped.

But theft and arson are not all which is to result from this spirit. The mass is assembled—the deed, whatever it may be, is to be accomplished—and whatever of resistance is met is to be overcome by force. Some opposition is encountered. The peace officer endeavors to do the duty that the law enjoins upon him, and is struck down, and left weltering in his gore. Are not the hands which have thus, in the excitement of the hour, taken their first lesson in assassination, more likely to resort again to violence of a like character when passion shall again prompt?

He who has formed one of the multitude in an assault upon a fellow-citizen, has his arm more ready to strike singly in a private quarrel. He who has broken into violence around a public prison, because he has been disappointed in his hope of witnessing a public execution, has prepared himself to commit other outrage when again thwarted in his wishes. He who has stolen from a burning convent is not to be trusted when a purse falls in his way. He who has put fire to its walls may do the same office to his neighbor's dwelling. He who has aided in shedding the blood of the peace-officer will not hesitate to imbrue his hands in the blood of any fellow being when passion or malice shall dictate, and the belief be entertained that he shall escape with impunity.

I would that this truth could be impressed, not only upon all who hear me, but upon the entire inhabitants of the whole country. Were it once understood, and realized, that the mobs, which are in succession disgracing one portion and another of our land, are in fact schools in which men are trained on to assaults, and theft, and arson, and murder, a much more correct estimate would be placed on them, and some hope might be entertained that the united force of the

great mass of the community would be exerted for their suppression.

And now the enquiry presents itself, in what way shall this scourge be stayed ?

The answer is—In the first place, let there be an expression of public opinion which shall make itself heard broad and wide over the whole land. Let the people speak out in tones of earnest indignation against all unlawful violence upon any and every occasion. Whether it exhibit itself single handed or in combinations, let it meet its merited condemnation whensoever and wheresoever it may make its appearance. Let a brand be placed upon it, and let there be no forbearance even if it be enlisted in the accomplishment of a favorite object.

We must condemn not only the mobs which execute what is contrary to our opinions, but those also whose object is to put down something to which we are opposed. They must all be delivered over to execration. We must not palliate some for the reason that they are engaged in a cause which we favor. The better the cause the more deleterious the example. If mobs were always found arrayed against public opinion, we should soon see an end of them. It is because they are often enlisted to effect something the result of which is agreeable to a considerable portion of the community that they are tolerated at all. But this will not do. We must know no distinction between them.

Let the press not only cease to prophesy violence and to excuse individual instances of it, but let its mighty energies be exerted in denouncing and holding it up to reprobation.

In the next place, let there be prompt action on the part of the proper authorities, to repress the first outbreaks of a mob. Let them be watchful and prepared, especially whenever there is danger, and let the people hold them strictly accountable in this matter.

And, lastly, whenever these shall be insufficient, let there

be a rigid enforcement of the law for the punishing of the offenders, through the judicial tribunals. It is here, in the temple of justice, that a firm stand must be made against that disregard of law, which threatens, if not met and resisted at the threshold, to overwhelm us, sooner or later, with anarchy and confusion. Let the grand jury diligently enquire, and leave no one unpresented because he is one of many who have been guilty of transgression.

Then may we hope that the time when the people crowded together to look with curiosity and astonishment upon any one who had "broken the law" will once more be known among us, and mobs be but matters of history.

I have called your attention more particularly to one species of infractions of the law—that committed by masses of people—because that has of late stood so prominent; but I have also alluded to the disregard of the provisions of our legal code, in other modes, either by many people or few; and I commend them, all and singular, to your careful enquiry and attention. Our free institutions can be sustained only by wise laws, and by intelligence, virtue, morality and religion among the people. So long as good and wholesome laws are firmly executed, although political parties may strive and contend; and although difference of opinion may exist upon any and all other subjects; our country will be safe. But if the constituted authorities, instead of being supported and sustained, are to be overawed—if infractions of the laws are to be tolerated, and they become extensively disregarded, whether upon one subject or another,—whether the infraction is by violence, fraud, or otherwise—it needs not the spirit of prophesy to assure us that the malady which will destroy, not only individual right, but eventually even our civil existence, has fastened upon us, and the fatal termination will assuredly come, and consign whatever is valuable in our institutions to the sleep of death.



God grant that we may do our part, not only to enforce private right, but to avert public calamity, by a firm attachment, now and upon other occasions, here and elsewhere, to the supremacy of the laws.

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*Gentlemen of the Grand Jury*—I would that I might stop here. I would that there was nothing requiring me to speak beyond the ordinary duties of the occasion. But it is not so. The voice of mourning is heard among us. The arrow of death has sped, and one long identified with the administration of justice in this state, has fallen.

Under such circumstances a sense of propriety calls upon us to leave, for a short period, the usual routine of business, and to perform a melancholy duty to the departed; and I should do injustice to my own feelings, were I to omit to offer, at this time, a tribute to the memory of one who has filled so large a space in the judicial history of this state as the late lamented Chief Justice RICHARDSON.

On the last assignment of the circuit among the members of the Superior Court, this term was allotted to him, and but for the unexpected dispensations of Divine Providence he would now be filling the seat occupied by the speaker, and you would have listened to his counsels, and others would have been guided by his decisions.

How forcibly are we reminded of the frail tenure by which we retain our hold upon mortal existence. During the last circuit, in December, he was laboring with all the diligence of any of his colleagues; and although for several years he had been subject to disease of the nervous system, when we parted, at the close of the circuit, he had, to all appearance, as strong a hold upon life as him who now addresses you in his stead.

But the attacks which had from time to time overcome the energies of a firm constitution, apparently only to prostrate them for a short period, leaving them, like the bent sapling of the forest, to spring back and exhibit their wonted vigor the moment the force of the pressure had passed away, had, it seems, in fact been wasting the vital principle; and after a brief space—a short illness—he sleeps in the silence of the grave.

There are few, who have been in any way connected with the public business in this state for twenty years past, to whom he was not known, and few who will not unite in mourning his death. But it is for those who have known him more intimately—who have been associated in his labors, or taken an active part in the business of the courts—to feel the magnitude of the loss which the state and his friends have sustained by his decease.

How often, apparently, is the world indebted to accident for the benefits received from some of the most distinguished men. The casting of a book in the way of slumbering intellect incites it to overcome all obstacles in the pursuit of knowledge. A beautiful harangue, or a successful argument, is sometimes the spark that lights the flame of ambition in the breast of one before destined to other pursuits, and he burns with the desire of emulation, and strikes out for himself a more brilliant, if not a more happy, career. Accidental injuries in the workshop, and in the field, incapacitating the party, for a greater or less period, from manual labor, have given to science some of her most persevering and successful votaries.

“We call it chance—but there ’s a Divinity—

“That shapes our ends, rough hew them how

“We will.”

An instance is before us. The subject of this notice was born at Pelham, in this state, January 4, 1774, and labored upon his father's farm until he was about fifteen years of

age, when an injury to his hand for a time incapacitated him for active exertions. During the period of leisure thus forced upon him, he indulged a taste for study, and determined to procure for himself a collegiate education. This he accomplished, and graduated at Cambridge University in 1797.

Immediately after this he engaged as an assistant instructor in an academy at Lancaster, Massachusetts; after which he took charge of Groton academy, and continued there as principal until his admission as a member of the bar.

In the course of his collegiate studies, and during the time he officiated as an instructor, he became thoroughly imbued with a taste for poetry, and classical and general literature, as is in some degree indicated by his appointment to deliver a poem upon the occasion of his graduation; and his love for such studies and pursuits continued unabated to the close of his life.

The law is generally accounted a stern mistress, requiring of her followers an untiring devotion at her shrine, and it is rare that her servants find leisure for eminence in any other pursuit; but with him literary acquisition was pastime—was recreation—and long after he had taken his seat upon the bench he studied the French, Italian and Spanish languages without assistance, and could read the two former with considerable facility. The work of some Italian poet was often his companion upon the circuit, and was perused with the eagerness of youthful ardor. With the Latin classics he was familiar, and read them often; and he urged upon others the importance of recurring to their classical studies, as the best means of acquiring and preserving a pure taste and a good style.

But it was not to foreign authors alone that he was attached. The study of the English classics was a favorite pursuit. The grave disquisitions of Milton, the sound philosophy of Bacon, and the varied richness of Shakspeare, furnished materials upon which he delighted to dwell. Nor

was the lighter literature of the day proscribed. Works abounding with anecdote and humor afforded favorite sources of relaxation amid the fatigues of abstruse investigation.

It was in conversation upon topics of this kind that we came to know and esteem the ripe scholar, and the instructive and amusing companion, in the person of the learned judge.

The great zest with which he enjoyed wit led him to commence a treatise upon it, in which he proposed to consider the various kinds of wit, and to give examples of them; but death has put an end to this undertaking ere it was matured.

Studies and amusements of this character, however, were not permitted to interfere with professional labors and official duties.

The study, and practice, and administration of the law, was the great business of his life; and to this he brought all the energies of a vigorous mind. He loved it as a science, and pursued it with delight as well as with diligence.

Having selected it for his profession, he entered upon the preparatory studies while engaged in the business of instruction, devoting the labors of the preceptor to sustain the student; and having finished his term in the office of Samuel Dana, Esq. he established himself at Groton.

His early efforts were such as to attract the notice of Chief Justice Parsons, who was not only eminently qualified to estimate professional merit, but possessed a disposition to encourage the junior members of the bar who were struggling for eminence; and he ever retained and expressed a grateful recollection of the kindness and assistance he had received, when young, from that great man.

You of course anticipate that he soon became distinguished as a well read and accurate lawyer. His stores of legal learning did not consist merely in a treasury of precedents and decisions, but he studied the great principles of the science; made himself an adept in special pleading, which requires not only acuteness and discrimination, but patient

and laborious investigation and reflection ; and to this he added diligence in the examination and preparation of the evidence, and talents as an advocate which commanded a very respectable share of forensic practice, extending into this state.

Amplly qualified to defend the case of his client by a resort to the niceties and technicalities of the system of the common law, and calling them into requisition when the interests of others confided to his care required them, he did not, however, delight so much in that mode of conducting legal controversies as in the resting of a case upon its substantial merits.

It was while residing in Groton in 1811, upon the occurrence of a vacancy, that he was elected to represent his district in Congress, and at the expiration of this term was reelected—supported the administration then in power, and recorded his vote in the affirmative on the question of war with Great Britain. But although he always had a lively interest in the great political questions which have from time to time agitated the country, political life seems not to have held out that allurements to him that it does to many others, and he resigned his seat before the expiration of the term.

In 1814 he removed from Groton to Portsmouth, in this state, and established himself in the practice of the law there ; and upon the reorganization of the judiciary in 1816 he was appointed chief justice of the superior court. Notwithstanding he had recently become an inhabitant of the state, and notwithstanding the appointment immediately succeeded a political revolution and an overthrow of a judicial system organized but a few years before by the adverse political party—and thus might be expected to be unsatisfactory to that party—yet his previous practice had made him extensively known, his advancement to the bench soon became acceptable, and he held the office until the time of his decease.

It was in the discharge of his duties in this station that

he was known to us all. It was here that we have seen him, day after day, and term after term, laboring with untiring industry to administer justice between contending parties. Here we saw his comprehensive mind grasp the strong points arising out of conflicting testimony and adverse argument, and witnessed the lucid manner in which he presented the case to the consideration of those who were to pronounce the verdict. Here he delivered those sound legal opinions which exhibited the extent of his research, the strength of his judgment, and his strong desire that justice should be done. And it is in the scene of his public labors that it becomes us to fulfil a last sad duty to his memory.

Up to the time of his appointment to the bench, although it is understood that the decisions of a distinguished jurist, still living, have been preserved in manuscript, none had been given to the public in an authentic form in this state. Under the auspices of Chief Justice Richardson and his associates, Mr. Adams, who for a long period held the office of clerk of the superior court, in 1819 ushered into notice the first volume of *New-Hampshire Reports*. A considerable portion of the second was drawn up by the chief justice; nearly all the cases of the third, fourth and fifth were furnished by him; and of the matter for, perhaps, four volumes more he has prepared a large share. His legal opinions will form an enduring memorial of his high qualifications for the station he occupied.

In addition to these, he published, during the same term, "*The New-Hampshire Justice*," and "*The Town Officer*"—manuals which have been of incalculable advantage to the state; and he had also prepared for the press a treatise upon the office and duty of sheriffs.

He was, moreover, during the same period, at the head of a committee entrusted by the legislature with the duty of revising and collecting together the provisions of different

statutes upon the same subject, and of arranging and publishing a new edition of the laws.

It will not derogate from the merits of any individual, to say that no one in the state has done so much, in the department of the law, to entitle himself to be deemed a public benefactor. Of the importance of his labors in this respect few except the members of the profession can form an adequate conception. But it may be realized, in some measure, from the consideration that our law is derived from the common law of England, so far as its rules are applicable to the condition of this country, and the different form of government here established, and from statutes which, like other statutes, owing to the imperfection of human language, often admit of different constructions. Until Judge Richardson took his seat upon the bench, expositions of the common law, determining how far it might be considered applicable here, and constructions of statutes which had been fixed by the decisions of the courts, rested in tradition, except so far as they were preserved in the private note books of judges or counsel. Lawyers, often more or less perplexed by an uncertainty respecting what may be the practical application of the principles of the science to a state of facts to be made out in evidence, were then necessarily more ignorant of the decisions of their own courts than of those of some other governments, having generally no means of ascertaining what had been here decided, beyond the limits of their own practice. And magistrates in the exercise of the powers conferred upon them had still less means of forming correct judgments.

How great ought to be the meed of commendation awarded to him, who has done so much to diffuse a knowledge of sound principles, and correct practice, in a department where they are of such vital importance.

Dartmouth College appreciated his labors upon the bench, and in 1827 conferred upon him her highest honors.

A life of professional labor furnishes but few occurrences

which to the great mass of the people would seem worthy of record. There are no startling events to excite wonder. There is nothing of 'pomp and circumstance' to attract admiration. But if, on the one hand, there are no 'passages of arms' to be celebrated, and no victories to be sung; on the other, the trophies are not stained with blood, and the notes of wailing and woe mingle not in the chorus.

The qualities required for successful exertion in the learned professions may, perhaps, not be inferior to those which enable their possessor to set a squadron in the field, or to direct the array of a battle; and Chief Justice Richardson exhibited them in a high degree of perfection. To an unspotted integrity, and conscientious faithfulness, was added great patience—a most important qualification for such a station; and a long administration attested that he possessed it in a remarkable degree. Urbane towards the gentlemen of the bar, courteous to witnesses, and extending to litigants an impartiality which often left in doubt his opinion upon contested questions of fact; a suspicion of attempted fraud, or probability of injustice, roused him to take a decided stand in favor of that side which appeared in danger of suffering wrong; and while cautious to impress upon a jury the principle that fraud and bad faith were not to be presumed, the tones of indignation with which he denounced them were the consequence of a deep love of justice, and desire that the right should prevail. But while he was thus firm in resisting whatever seemed to savor of injustice, the individual arraigned as a criminal was usually a subject of compassion, and his administration of that branch of judicature was based upon the humane principle that it is better that many guilty should escape than that one innocent person should suffer.

Notwithstanding all the divisions of parties and sects, he commanded general confidence, and his judicial character was summed up in a single short sentence, by a highly respected citizen, when he exclaimed, after musing upon the intelligence of his death—"Well, the good old judge has gone!"



How full of eulogy are these few words. His had been a long judicial life. He had held the office of chief justice nearly twenty-two years. He had lived to witness nearly two entire changes of all his associates, and he was also approaching that period—"three score years and ten"—which almost marks the limit of human activity, and with us absolutely terminates judicial labor. He might well be spoken of in connexion with the lapse of time. He was aged in the public service. And after such a period of devotion to the labors of a judicial station—after exerting the best energies of the meridian of existence in the service of his fellow men—when he is at last called upon to surrender up the trust committed to him on earth, what could any incumbent of the bench desire from those he leaves behind, more than the character of 'the *good* judge.' How much is included in it. Learning, integrity, impartiality, firmness, industry, faithfulness, patience—these are all necessary to the character of the good judge. Nay, what is not necessary—what is not included in it. "Well done, good and faithful servant." There needs nothing more of commendation.

Is any one disposed to inquire if he had no foibles. Let it be answered, none to speak of here—few to form the subject of comment elsewhere.

It is not, however, in the character of a literary student, and of a good judge, alone, that our late venerated Chief Justice deserves to be remembered. He was the good husband, father, and friend. At his residence in Chester, to which he removed in 1819, I have often had occasion to view him in these relations. Upon the bench, and in his intercourse with society at large, he commanded the respect and admiration, and acquired the esteem of his friends; it was in the domestic circle, and at the family fireside, that they learned to love him.

There his attachment to botany and horticulture was exhibited. There, to a limited extent, he cultivated music, for which he had a fine taste. There he exerted himself

for the promotion of science and education, and the support of morals and religion. There he called his friends around him, and wit and anecdote delighted the circle, and there also they were indebted to him for counsel, instruction and assistance which will ever be remembered with gratitude. "You have lost an associate"—says a member of the bar in a letter announcing his decease—"You have lost an associate, and I a friend whose place can never be supplied. You can conceive, though others cannot, how invaluable a friend he was to me." The affection, and benevolence, and kindness, and simplicity of his character were there daily exemplified. Who shall enter that house of affliction and stay the sorrows of the family by which he was so fondly beloved.

A firm believer in the Christian religion, although not a member of any church, its precepts were honored in the patience and resignation with which he endured the severest dispensations, and which were evinced in that illness which resulted in death.

Soon after his elevation to the bench a fever reduced him to the confines of the grave, and after having apparently destroyed all vitality except a last fluttering respiration, left him to a protracted recovery, and to remain crippled for life. In after years the visitation of severe nervous affections and spasms, caused great suffering, and at times incapacitated him for business. And yet during an intimate acquaintance of years, I do not recollect to have ever heard a murmur fall from his lips on account of his deprivation, and scarce an expression of impatience during periods of agony. Patience and fortitude seemed to have, with him, their perfect work. And when disease assumed another form, and the king of terrors finally asserted his jurisdiction, I am assured that he "repeatedly expressed his gratitude that he had felt so little anxiety of mind"—"throughout declared himself perfectly willing to live or die as should be decreed"—"retained his usual kindness of feeling and his usual interest in the wel-

fare of his friends"—and "met his fate with philosophic resignation."

Such is a brief and imperfect sketch of the character of WILLIAM MERCHANT RICHARDSON.

Alas, all these high and ennobling qualities—these gifts of intellect, so well calculated to adorn and illustrate public service, and these social affections, so admirably adapted to win and secure esteem and love in private life—avail not, as we know, against the summons of death;—and he, to whom the learned looked up with confidence in his legal knowledge—he, whose intelligence and vivacity gave life and zest to social intercourse—he, around whose steps in the domestic circle so many kindly affections clustered, has been called from his place in an earthly tribunal to stand before the judgment seat of an Omniscient Being, to whose decrees it becomes us to bow with reverence, as well as with awe, in the firm conviction that 'the Judge of all the earth will assuredly do right.'

Though dead may he yet live in remembrance for our edification and improvement. May the recollection of his diligence and perseverance in the acquisition of knowledge incite us to greater industry and application—May his integrity and love of justice, and his faithfulness, urbanity and patience, remind us that it is only by the exhibition of like virtues that we can fulfil the trusts committed to public servants—May the domestic virtues which shone so conspicuously in his life, light our onward path. And when required by the mandate of the Almighty to exchange Time for Eternity, may we exhibit the same fortitude, and a like resignation to the divine will.





Recd Feb 5 1843  
The Gift of the Reverend  
Luther Hamilton,  
Concord N H

**CHARGE**

TO THE

**GRAND JURY,**

UPON THE UNCERTAINTY OF THE LAW, AND THE DUTIES OF  
THOSE CONCERNED IN THE ADMINISTRATION OF IT.

DELIVERED ON THE CIRCUIT,

1841 AND 1842.

BY  
**CHIEF JUSTICE PARKER.**

PUBLISHED BY REQUEST.

CONCORD, N. H.  
LUTHER HAMILTON.  
1842.

Bill. 10/10/10  
Germans all the time  
and all the time  
1/1/10

## CHARGE.

### *Gentlemen of the Grand Jury :*

It is not uncommon to hear complaints of the uncertainty of legal proceedings. It has in fact grown to be almost a proverbial accusation against courts of justice.

So far as this uncertainty furnishes an argument to dissuade men from litigation, where substantial justice can be obtained without a resort to judicial process, it is a fair subject for comment, and the argument may well be used to promote so desirable an object.

But this uncertainty is not unfrequently referred to as a subject of reproach upon the law, the legislature who enact it, and the courts and their officers engaged in the administration of it—and in this point of view it often forms a theme of declamation for those who have had little opportunity to consider how sedulously a well regulated system of law endeavors to guard, in its administration, against the imperfections of human nature and the practices of dishonest men.

An expectation that any system of law, or any administration of any system, can give mathematical demonstration of the correctness of all its results and decisions, is too visionary to find a resting place in any intelligent mind. A supposition that any system could be so administered as that all its verdicts and determinations should be free from any exception, would be to suppose that the tribunal which administered it was no longer human, but possessed attributes which belong to the Deity alone. A belief that any system, however near its approach to what, as applied to human affairs, we term perfection, or that any legal tribunal, however learned, and virtu-



ous, and industrious its incumbents might be, could, in all its judgments, realize the expectations, or command the assent and approbation of adverse litigants, or their friends, would be a belief that a human judicature could accomplish what the Deity himself has never yet done.

The constitution of the minds of men is such, that scarce any proposition commands the assent of all. They do not think alike. They assume different premises—and even from the same premises they do not reason alike, and of course often arrive at different conclusions.

There are few subjects which engage the attention of courts of justice which admit of mathematical demonstration. In those that do, men often, if they cannot gainsay the process, deny the propriety of the result.

If there is no controversy, therefore, about the truth of the allegations in a case, there may be often well founded doubts as to the result, from the various views and different reasonings respecting the construction to be put upon the provisions of the law itself. And these various views arise respecting the enactment of statutes, as well as respecting the provisions of the common law. This will not appear strange, nor be considered as a matter of reproach to the law, if we consider how many and various readings have been given to some portions of the holy scriptures, and how many differing and contrary doctrines men draw from them.

It is perhaps true that too little care is often exercised in framing statutes. But it must be great indeed to arrange the phraseology so accurately that no question, ending in differences of opinion, can be raised respecting the intent and meaning of the legislature.

But a much more fertile source of uncertainty in the issue of judicial proceedings is found in the inability of parties to determine what are the true facts involved in the dispute. The causes of this are infinitely diversified. A want of knowledge respecting all the sources from which testimony is to be derived, often causes the loss of a suit upon which much confidence had been placed. Even if a party has full knowledge of all the witnesses to be introduced upon the trial, he has often but limited means of ascertaining what the testimony itself will be. It is not an uncommon occurrence that a party's own witness fails him in a point where he had regarded himself as most secure. And witnesses who were present at the same transaction, and who, it would seem, at first thought, should relate the circumstances in the

same way, very often give most contradictory accounts of it, and doubtless in many instances are all equally honest in their convictions that they relate the circumstances correctly.—The senses are deceptive. People do not see alike. The organs of vision in some are much more strong than in others. The sense of hearing in one is much more acute than it is in another, who stands by his side. The powers of perception are more quick in this one, so that he more readily apprehends. The temper of that is more sedate and cool, and he observes more calmly, and is less liable to mistake, than him whose passions have in some measure disturbed the balance of his mental faculties. Prejudice creates a bias. Fear and affection give a coloring to the events they witness, and prevent a correct understanding of the facts as they transpired. And in addition to all this, there is an astonishing difference in the memory, or power of recalling what has taken place—and the ability to state what is actually within their knowledge is much greater in some individuals than in others.

It is from these causes, and others of a kindred character, that many controversies arise respecting the facts, in cases brought before the courts of justice ; and if all individuals were honest, and there was no other source for doubts, much uncertainty as to the issue of judicial proceedings must arise from these causes alone.

But there are other causes, in some instances, which make it difficult to arrive at the truth of the matter in controversy. There may be, and perhaps is sometimes, a suppression of the truth by the intimidation of witnesses, and by persuading men of weak minds that they cannot safely testify to what they actually know—and there may be, and sometimes is, a procuration of additional testimony, by persuading witnesses that they recollect that of which they never had any knowledge. Constant reiteration may in some instances do this, where the individual operated upon is neither dishonest, nor much below the average grade of intellect. In both of the foregoing instances there is a perversion of the truth ; and whether it be by its suppression, or by additions which do not belong to it, the agent, who designedly accomplishes the object, stands, in a moral point of view, little better than him who is directly guilty of subornation of perjury. There is also a fraudulent suppression of the facts in some instances, by hiring witnesses to be silent, or to absent themselves—and there is, furthermore, subornation of perjury, and perjury itself, which, when resorted to, must almost necessarily obscure, if they do not eventually pervert and stifle the truth.

2 If judges should be corrupt, no dependence could be placed upon their decisions. If they were ignorant of the law, and their duty under it, or if they should act with reference to the views of any political party, little confidence could be entertained respecting the result of judicial investigations. Too great haste and impatience, even, on the part of the court, may result in giving false appearances to a case, and thus materially affect the verdict.

If counsel, to whom the instituting and conducting of the case is necessarily entrusted, should so far forget their duty as to become participators in the suppression or manufacture of testimony—or brow-beat a witness, believed to be honest, for the purpose of making him say what he did not intend to say, or forbear saying what he was about to state, or otherwise pervert his testimony, with a view of making truth appear as falsehood, or giving to falsehood the guise and garb of truth—or should they, by any underhand practices, at the trial, deceive or mislead the jury, as to the facts—or attempt to obtain a verdict against what was clearly the law and evidence of the case, by appeals to popular prejudice, or party feeling—all such attempts, if attended with any success, would add another to the means by which fraud and chicanery are sometimes enabled to triumph over justice.

And should the jurors, to whom the case is eventually committed, instead of following out the evidence to its results, and founding their verdict upon the law and that part of the testimony which they conscientiously believe to be true, suffer themselves to be approached by the parties or their friends out of court, and listen to their representations, which must in most cases be partial, if not dishonest—or should they be swayed by passion or prejudice, or favor, to disregard the law, or evidence to which no exception could be taken—it is apparent that however honest and correct the witnesses might be—with whatever of integrity, intelligence and deliberation the case might be conducted by the court and counsel, no certain dependence could be placed upon the result.

It is apparent, therefore, that most of the sources of the uncertainty which attends legal proceedings, are not properly chargeable upon the law as a subject of reproach, but are in some measure inseparable from the infirmities of human nature, and from the subjects which come under the cognizance of the tribunals of justice—and in some measure owing to frauds and imposition, which no system of laws, however well administered, can effectually prevent.

Our system of law and judicial proceedings, if faithfully executed, is certainly well adapted to the attainment of truth and the dispensation of justice. Imperfection of language cannot, of course, be overcome by any system or legal enactment; but with us no statute can be adopted until it has received the examination and sanction of the house of representatives and the senate, acting separately, and has, moreover, been submitted to the governor for approval. These guards would seem, in theory at least, to be sufficient to secure the people against all hasty and unadvised legislation; and the exercise of care by those who are thus entrusted with the framing of the laws, must do much to prevent a difference of opinion as to their true interpretation. The great body of the common law, which forms a part of our system, does not, it is true, come to us through this ordeal, but its great principles have been so thoroughly examined by courts and by commentators, that they have become well settled and understood—and although differences of opinion must often exist respecting its details, and respecting the application of its principles to the particular facts which arise in a case, the practice of reserving questions, where doubt exists, for the consideration of the tribunal of the last resort—of hearing them argued by the counsel upon both sides—of a personal examination by the members of the court, and a consultation and discussion, resulting in an agreement of a majority at least—if it does not secure in all cases a correct result, is certainly very well adapted to produce one.

Nor can the imperfection of the faculties of perception, or prejudice, or the defects of memory, be removed by any direct legal provision. Education, it is true, may do much in cultivating the intellectual faculties, in the extirpation of prejudices, and in strengthening the memory. It is the opinion of an intelligent and candid foreigner who recently visited us, and one which is often expressed upon his pages, that sufficient attention is not paid to the subject of education in this country; and this opinion probably cannot be controverted. But if in the cause of education we do not accomplish all that ought to be done, our legal system respecting common schools is entitled to, and receives commendation.

For the commission of perjury, and subornation of perjury, the law has provided a punishment. From the nature of the case, there are more than ordinary difficulties in making due proof of the commission of perjury; and perhaps there is sometimes too great a presumption on the part of juries against the commission of a crime so

odious. There is undoubtedly a disposition, among honest men, to disbelieve that any one, so long as he retains any standing in the community, can become so corrupt as to call his God to witness his declaration that a matter is true which he knows to be false. But this disposition to believe in the honesty of mankind, however amiable it may be, should not be suffered to overrule the evidence in any case, and to guide the opinions of the jurors to an acquittal against the testimony. If it does so in any instance, it operates to encourage the commission of the offence. The result, however, in such case, is not properly chargeable to the law, but to the disregard of duty by the particular jurors who pronounce the verdict.

The theory of the law requires that all appointments to the bench shall be from among those best qualified for the discharge of the responsible duties devolving upon its incumbents, although no statutory provision could well designate any particular standard of intellectual qualifications. And for the purpose of securing the performance of these duties, an oath is prescribed, to be taken by each individual, binding him to the faithful and impartial discharge of them. (1.) In the nature of things, no laws can always prevent corruption; but no judge can act corruptly or partially upon the bench, or with a view to serve the purposes of any sect or party, without violating his oath of office, and rendering himself liable to impeachment. And if, without being corrupt, he is incompetent, morose, inattentive, or otherwise misconducts, he may be removed, on an address of the senate and house of representatives for that purpose.

The oath required to be taken by the members of the bar goes still farther. It is in these words: "You solemnly swear that you will do no falsehood, nor consent that any be done in the court; and if you know of any, that you will give knowledge thereof to the justices of the court, or some of them, that it may be reformed: that you will not wittingly or willingly promote, sue, or procure to be sued, any false or unlawful suit, nor consent to the same. You shall delay no man for lucre or malice, but shall act in the office of an attorney within the court according to the best of your learning and

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1. A Province law of 1718 prescribed the following as the oath of judges: "You swear, that well and truly you shall serve our sovereign Lord, the King, and his People in the office of a justice of court, and that you will do equal law and execution of right to all people, poor and rich, after the laws and usage of this province; and in such cases as the law doth especially provide to be relieved in equity, there to proceed according to equity and good conscience, without having regard to any person. *So help you God.*"

discretion, and with all good fidelity as well to the court as your client. So help you God." (2.)

It is apparent from this, that if there is any client who supposes that it is the duty of his attorney to obtain a victory for him by means known to the attorney to be fraudulent, or even unfair, he has but a very limited perception of the moral and legal obligations which rest upon the members of the bar. No mere agent would be justified in promoting the interest of his principal by unfair means; but an attorney and counsellor, although in one sense an agent, is not a mere agent for his client, but is an officer of the court, to which he owes duties of as imperative obligation as those which he is required to perform for his client.

The first part of this oath requires that the attorney shall do no falsehood. It is not obligatory upon him to make such a display of truth as to volunteer evidence merely to help the adverse party. The oath does not impose upon him such a duty. But it does require of him that no evidence, known by him to be false, should be introduced, and that no false statement should be made to the court or the jury. And not only so, but that there should not be such a suppression of truth as to amount to a falsehood. Putting into the case a part of a thing as if it was the whole, and designedly suppressing the rest, with the purpose of misleading, may well be considered as coming within the terms of this clause.

An attorney is not only not at liberty to do any thing which is false, but he is required not to consent that any falsehood be done. And he is furthermore placed under obligation, if he has knowledge of any, that he will communicate that knowledge to some member of the court, in order that it may be corrected. In whatever shape falsehood may be perpetrated in court, an attorney cannot participate in it, or even conceal it, without a violation of his duty.

The next clause forbids him wittingly or willingly to sue, or in any way to promote, or consent to any suit which is false or unlawful. The attorney who institutes, or in any way promotes, or who is even consenting to the prosecution of a suit which he knows to be without foundation, violates this part of his official oath.

He is next bound that he will not delay proceeding and performing his duty, in any matter entrusted to him, for gain or reward, or on account of any malice. And after all these particulars, in order

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2. The oath of attorneys enacted in 1714 was substantially the same.

effectually to insure a proper discharge of professional duty, the oath concludes with a general obligation to act in the office of an attorney within the court according to the best of his learning and discretion, and with all good fidelity, as well to the court as to his client. If the former part of the oath does not in terms forbid an attorney to promote and sustain any defence known to him to be false or unlawful, the obligation to do no falsehood, and that of fidelity to the court, will not permit him to aid in sustaining a defence known to him to be false or fraudulent. And the whole tenor of the oath shows that it was intended to secure upright and fair practice, as well in the defence as in the prosecution of suits, and indicates the high standard of professional morality required of the members of the bar.

To have extended its promises and obligations much further into detail would not have attained any beneficial effect, but might have impaired its solemnity. You shall not persuade a witness that he cannot safely state that which he knows to be true—nor induce him to state that which you have good reason to believe is false—You shall not browbeat a witness in order to impair the effect of evidence which you are satisfied he gives correctly, nor ask him questions with intent to entrap him, and thus destroy the testimony that he has truly delivered—You shall not attempt to suppress the truth, by stopping a witness when giving his evidence—nor attempt to mislead the court or jury by a mis-statement of the testimony, or an argument which you know is an imposition—Special clauses of this character would add nothing to the obligations of an attorney's oath. They are all comprised in the obligations to do no falsehood, and to act with all good fidelity to the court.

For the due observance of these and other duties, reliance is also placed upon the honor and character of the attorney, or if that should by possibility fail, upon the correction of the court. The first is generally sufficient. When from inattention, or otherwise, that is not effectual for the purpose, a delicate and difficult duty is devolved upon the court—both delicate and difficult, because in most instances it is almost impossible to determine with certainty whether the bounds of duty have been overstepped; and because when they have been, a direct and prompt interference to check the aberration of the counsel, might prejudice the case of an innocent client. (3.)

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3. "There is undoubtedly a limit to the exertions of an advocate for his client. He has a right—it is his bounden duty—to do every thing which his

In order further to insure the due administration of justice, the law has provided that the selectmen of the several towns shall select a list of persons of good moral character, and having a certain estate, and judged by the selectmen as most suitable and best qualified to serve as jurors, and from the names upon this list, placed on separate papers, mixed up and held so that they cannot be seen, the number of jurors required by any venire is to be drawn and returned. This provision of the law is intended to secure the attendance of individuals who are qualified and impartial. If selectmen in making a selection should put the names of persons into the box because they were personal or political friends, or for any other reason than because they judged them to be most suitable and best qualified, that would be a violation of their duty and oath.

Upon the jurors, when empaneled, an oath or affirmation is also imposed. That prescribed for grand jurors has just been administered to you. (4.) The first clause requires the grand jurors diligently to inquire, and to make a true presentment of all such matters as shall be given them in charge. This particular phraseology was probably adopted centuries since, at a time when the institution of a grand jury was in its infancy, and when its duties were not defined by known and settled rules, but depended in some measure upon the direction or charge of the court. Subsequent improvements in the

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client might honestly do, and to do it with all the effect which any exercise of skill, talent, or knowledge of his own may be able to produce. But the advocate has no right, nor is it his duty, to do that for his client which his client *in foro conscientie* has no right to do for himself; as, for a gross example, to put in evidence of a forged deed or will, knowing it to be so forged."—*Coleridge's Table Talk*.

In the "Character of an Honest Lawyer," printed in 1676, it is said, among other things, that he is "one that practices the law so as not to forget the gospel, but always wears a conscience as well as a gown. He weighs the cause more than gold; and if that will not bear the touch, in generous scorn puts back the fee. Though he knows all the criticisms of his faculty and the nice snapperadoes of practice, yet he never uses them, unless in a defensive way, to countermine the plots of knavery; for he affects not the devilish skill of out-baffling right, nor aims at the shameful glory of making a bad cause good; but with equal contempt hates the wolf's study and the dog's eloquence; and disdains to grow great by crimes, or build himself a fortune on the spoil of the oppressed, or the ruin of the widow and orphan. He has more reverence for his profession than to debauch it for unrighteous purposes, and had rather be dumb than suffer his tongue to pimp for injustice, or club his parts to bolster up a cheat with the legerdemain of lawcraft."

4. The oath of the grand jury, as prescribed by the Province law of 1718, was in substance like that now administered; but it was first administered to the foreman, and the other members of the jury were then sworn—"The same oath which your foreman hath taken on his part, you and every of you on your behalf shall well and truly observe and keep. So help you God."



law have reduced this branch of criminal judicature to such a system that the law gives it in charge to the jury to present all crimes which upon diligent inquiry they shall find to have been committed within their county, and of which magistrates have not final jurisdiction. Valuable aid in the performance of this duty may be derived from the remarks of the court. The form of the oath seems to contemplate that a charge should be delivered; and the invariable usage of this state has been so; but in many instances the principal topics treated of have been those not immediately connected with the business before the jury; and so little does the actual duty of the jury now depend upon the special directions of the court in the charge, that should nothing be said by the court except to direct the jury to proceed to the discharge of their duties, the obligation upon the jurors to inquire and make a true presentment would be equally binding.

The oath proceeds to require of the jurors to keep secret the counsel given by the attorney for the state and by the jurors. This is an important branch of the obligation of the grand juror, and it is to be feared that it is sometimes disregarded through misapprehension. The deliberations of the grand jury are only preparatory to the accusation and final trial, and are not open to the attendance of the community generally. If their deliberations and determinations were made known, persons accused would in many instances have an opportunity to escape—and in others, their resentment might be excited against the state's attorney, or some of the members of the grand jury. To prevent such consequences, the oath of the grand juror binds him not to disclose the counsel given on behalf of the state, or that by himself and his fellows, in any matter which may come before the jury. Respecting these matters his lips are sealed.

And it may here be remarked, that although the officer attending the jury is not required to be sworn, it is improper for him to make any disclosures, if he happens to obtain a knowledge of the proceedings of the jury.

Next follows an obligation to present no man for envy, hatred or malice. Selected as the jurors are, from among those best qualified for the discharge of the duty, there would seem to be but little danger that they could so far forget their duty as to permit evil passions of this description to influence their decisions; but so careful is the law in protecting the rights and liberties of those who live under its government, that it imposes the duty of discarding such passions, in

express terms and under the sanction of an oath or affirmation. And while the law is thus solicitous that no innocent man shall be indicted by reason of any prejudice or malice on the part of the jurors, the following clause contains an equally imperative obligation that they shall not leave any one unrepresented for love, fear, favor, affection, or hope of reward. No juror is at liberty to permit himself to be swayed by love, favor, or affection, or awed by fear, or induced by hope of reward, and for any such reason to refuse to find an indictment. His oath forbids it.

And here again the law, not content with the special obligations already adverted to, imposes upon the grand juror, by the concluding clause of his oath, the duty of presenting all things truly as they shall come to his knowledge, according to the best of his understanding. He is bound to present all things truly as they come to his knowledge. Of course it is clear that the matter is not left to his discretion. The jurors are not at liberty to indict or refuse to indict, according to their mere pleasure, but according to the evidence before them. Favoritism, and prejudice, and fear, as well as hope of reward, are excluded—and this is not all. The further obligation is diligently to inquire, and to present all things truly, which upon such diligent inquiry shall come to their knowledge. If there is proof before the jury that a town has neglected to make or repair a highway, or that an unlicensed person has violated the statute respecting the sale of liquors, the jurors are bound to present offences of that character, by the same obligation that binds them to present murder, or robbery, or larceny; and if they do not do so, what answer can they make to their consciences? Will it do for a juror to say that the highway complained of is in as good repair as some in his own town—or that he thinks it a hardship on the town to make it, and therefore he will not indict? Let him look at his oath—let him ask his conscience. May he allege that he is opposed to the provisions of the license law, and therefore decline to indict the offender? Would that be to present things truly as they came to his knowledge?

These are selected as instances, because there have been complaints, in some counties, that grand jurors have disregarded their duty in these particulars. But they are selected only as instances. The duty applies to all cases; and the safe guide to the juror, in the performance of his duty, is to refer to the terms of his oath of office.

It is not many years since that, in an application for a divorce, in

one of the counties of this state, an affidavit was filed in which the individual solemnly swore that he had done that which was an offence by the laws of this state, and under circumstances of an aggravated character. The court granted the divorce; and deeming such voluntary proclamation of his infamy, by the witness, a proper subject for judicial notice, delivered the affidavit to the attorney general, who laid it before the grand jury, with the testimony of the justice before whom it was taken; but the jury neglected to find any bill. What ideas the members of that jury had of the obligations of an oath, or how they satisfied their consciences for such a palpable dereliction of duty, is not known. Whether it was the result of ignorance, or corruption, what certainty can there be in the execution of the law if committed to such men? The fault was not in the law itself, but in its administration, or rather in the want of an administration of it.

The oath of the jurors empaneled for the trial of causes binds them to give a true verdict, according to law and the evidence given them.

When the parties see fit to commit the decision of their case to arbitrators or referees of their own selection, the law gives them power to decide according to what they may deem the equity and justice of the case. But different men have often widely different views of the equity and justice of particular cases. If the parties select men in whom they have confidence, this forms no objection, for the parties agree in such case to abide by the opinions which may be formed by their own tribunal. Where, however, the parties do not agree upon the tribunal, but resort to that which the law has provided, in order that they may know the rule of decision which is to govern, and thus have, as far as possible, a degree of certainty as to the result, the law does not admit its tribunal to act upon such a principle, but requires the decision to be made according to the rules of the law, and the evidence before the jury—and this is required under the sanction of an oath or affirmation.

In order to give any good degree of certainty to the proceedings of a court, it must act in accordance with some known rules. It is impossible for general rules to apply equally well to the variety of facts which are presented in a court of justice, and thus there will necessarily be some cases which appear to be cases of hardship. This results from the infinite variety of transactions between man and man, which general rules cannot in all cases fully meet and provide for.

But general rules are far better than no rules, and the only way in which to approach any thing like certainty in the administration of justice, is to adhere to them, and apply them to the facts of each particular case—and this the oath requires of the petit jury.

And in order still further to secure a fair trial to the parties, the law strictly forbids any attempt to influence the jurors by statements out of court. "Any attempt whatsoever to corrupt, or influence, or instruct a jury, or in any way to incline them to be more favorable to the one side than the other, by money, promises, letters, threats or persuasions, except only by the strength of the evidence and the arguments of the counsel in open court at the trial of the cause," or otherwise by the permission of the court, "is a proper act of embeccery, whether the jurors on whom such attempt is made give any verdict or not, or whether the verdict given be true or false"—and "neither the party himself, or his counsel or attorney, nor any other person whatsoever, can justify any indirect practice of influencing a jury." The court may proceed against this offence in a summary way, as a contempt of court; and whenever any such attempt is made, it is the duty of the juror to give information of it to the court, the state's counsel, or the grand jury.

It is a gross insult to a grand juror to attempt to dissuade him from finding an indictment, or to urge him to find one, by statements not under oath, made out of the jury room—and it is equally an insult to a petit juror to attempt to influence his verdict in any other way than by the evidence, arguments, and charge at the trial of the cause. It presupposes that the juror may be swayed to disregard his duty—that he may be tampered with—that he is either ignorant or dishonest.

In order to elicit the truth as effectually as possible, an oath is also administered to the witnesses. They cannot, consistently with its obligations, suppress what they know to be material to a case, nor state as facts what they do not know to be true. When a witness is examined by special interrogatories, and forbears to state something which he knows, which is not within the scope of those interrogatories, and which he does not know to be material, he is not in fault; but he ought not to withhold what he knows to be material, on the plea that he was not asked about it. Nor can he shield himself from the obligations of his oath by any cunning phraseology. He that corruptly swears that he thinks, or believes, that to be true which he knows to be false, or that he has an impression that a matter

is so, which he in fact believes to be otherwise, is as much guilty of perjury as if he had sworn directly to its truth.

Gentlemen—The obligations of official duty are upon and around all concerned in the administration of justice. They are enforced by the solemn sanction of oaths. As we perform or fail in the performance of that duty, we do something to render the administration of justice certain or uncertain—something to make the laws respected, or bring them into reproach—something of justice or injustice to the parties whose cases are on trial before us—something to meet the approval or condemnation of the community and our own consciences—and something which may be for weal or woe to ourselves at the bar of a higher tribunal, when earthly courts have no longer any existence.

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CHIEF JUSTICE PARKER'S ADDRESS

BEFORE THE

PHI BETA KAPPA SOCIETY

OF

DARTMOUTH COLLEGE,

JULY 29, 1846.



PROGRESS.

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AN

ADDRESS

BEFORE THE

PHI BETA KAPPA SOCIETY

OF

DARTMOUTH COLLEGE,

JULY 29, 1846.

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BY JOEL PARKER. 1795-1855

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HANOVER:

PRINTED AT THE DARTMOUTH PRESS.

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October, 1846.



It was not the aim of the following Address to astonish by its novelty, and I have little ambition to add to the stock of unread pamphlets. But there have been requests for its publication, other than what may be deemed the formal one of the Society ; and if the truths, which it was its object to enforce, may be impressed the more strongly, even upon the minds of a few, by its circulation, its publication will not be a matter of regret.

Keene, September 15, 1846.

# ADDRESS.

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The present, is said to be an age of great progress. The assertion can hardly fail to be impressed upon our minds. It is iterated, and reiterated, as if there were danger that it should fail of being credited; or as if it were a particularly grateful theme on which to dwell. On every side it is a subject of exultation. It is borne to us from every point of the compass, and is wafted in every breeze. From the shop of the artisan, and the closet of the student; from the laboratory of the chemist, and the stump of the politician; from the newspaper press, and the Congressional hall; on the fourth of July, and the annual thanksgiving; it is echoed, and re-echoed, until the sound of it pervades the whole land, and the conviction of its truth must be brought home to every understanding.

The reality of this progress, in many departments of life, is not to be gainsaid. In all matters relating to the physical wants of mankind, the improvement of the present age stands conspicuous. The mechanic arts have erected palaces upon our waterfalls, almost as if the artisans possessed the lamp of Aladdin; and they have filled them, not with the splendor and magnificence of empty show, but with the busy hum of successful industry. The fabrics which a few years since, in the domestic shuttle and loom, were almost of as slow progress as the web of Penelope; are constructed as if by the art of magic. Steam, of which the only known property, until recently, was to

scald the fingers of the unwary housemaid, is now playing the part of Eolus, by propelling mighty vessels across the broad waste of the ocean; or performing the part of a patient beast of burden, drawing at its heels hundreds of passengers, and hundreds of tons of merchandise. It is no longer our coast alone, that may be spoken of as "iron bound." The saddle, and the baggage waggon, are fast disappearing from our great thoroughfares, and the pillion has already become "an obsolete idea." Even the lightning of the heavens has been pressed into service, as the Mercury of the Exchange, carrying messages of the rise of flour, and the fall of stocks. The population of this country, doubling in less than a quarter of a century, is extending itself to Lake Superior, and the Pacific ocean, and exhibiting, in the acquisition of wealth, and the diffusion of happiness, the blessings of free institutions.\*

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\* It is not safe for any one to assume the office of a prophet, if his prophecy attempts to place a limit upon scientific discovery or mechanical invention.

Schultz, whose travels in the West were published in 1810, speaking of the probable trade of that part of the country thereafter, says, "The latter," (New Orleans,) "can never send any goods to the mouth of the Ohio in less than sixty days, and at a cost of nearly six dollars on every hundred weight." *Vol. 2, p. 10.* Within twelve years afterwards the transportation was made in about one sixth of that time, and probably at a sixth of the expense.

Dr. Kidd, who wrote a treatise on "the adaptation of external nature to the physical condition of man," (being one of the Bridgewater treatises upon the power, wisdom, and goodness of God as manifested in creation,) after speaking of the means which the chemist, in his laboratory, has for exciting and maintaining light and heat, has this passage:—"There are few individuals, however, who have commonly such magic instruments at hand; and even if they had, it is probable that they would want both the leisure and inclination to preserve them in a state fitted to produce at any moment the intended effect; for though each successive year has of late given birth to some new form of apparatus calculated to produce instantaneous light, we find ourselves constantly recurring to the flint and steel, which our forefathers of many generations have used; and which will doubtless be the staple apparatus of our latest posterity." *Chap. vi, Sec. 3, p. 61.*

The dedication of the work is dated in March, 1833, and the American edition of 1836 was hardly in the hands of its readers before this "staple apparatus" was in almost entire disuse for the purpose of producing light.

It is easy to talk in this strain, and were I to pursue it, I might, perhaps, add my poor mite to the national complacency; and, perhaps, also, secure, reflectively, a small portion of the approbation which is usually bestowed upon those who minister to our self-satisfaction.

But we may dwell too exclusively on the contemplation of our progress, and thereby form a false estimate of the real improvement of our race. If we enquire more critically, we may find that this great progress, if not confined to particular departments, is not equally conspicuous in all the avocations and relations of life; and that the adulation which we are wont to proffer to our race, or our nation, should be less lavishly offered; and our exultation at our progress in wealth, and its concomitants, be somewhat more subdued.

It is not in all the branches of mechanics, even, that the same improvement appears. The shawls of Kashmir, which were celebrated for their fineness and beauty two, and perhaps three thousand years ago, still maintain their ascendancy in female estimation. The Etruscan vase, of which the form dates back more than 2500 years, furnishes the model for the manufactures of the present time. And the splendor of the ancient dyes, if it may in some instances be equalled, is not excelled by those of modern date.

The magnificence of the palaces of the renowned city of Babylon, with their hanging gardens, and pleasure grounds, throws into the shade all the royal residences of the monarchs of the present time. And the grandeur of the pagan temple of Belus, in the same city, and of those of ancient Thebes, far surpassed that of any of the temples, which in our days are consecrated to the service of the living God.

We raise our national monuments with much effort, and send them, as mementos of national triumph, "to meet the sun in his coming;" but the pyramids of Egypt show that a people once existed who could erect mightier monuments than those of our days, and who probably were not obliged to resort to "ladies' fairs" to finish the

evidences of their renown, although they perhaps did to means more exceptionable.

We point with exultation to the walls of granite on either side of our rail road tracks, and indulge in a laudable pride while we comment upon the energy and perseverance which have forced their way through such formidable obstacles; but the city of Petra, with its houses, and palaces, and temples, cut in the solid mountain, is an enduring testimonial of labors and toils, in this respect, far beyond any of those of modern days.

Even in the cities of our dead, we cannot come into competition with those of a remote age. The pride with which we contemplate Pere la Chaise, and Mount Auburn, may well be chastened by a recollection of the catacombs of the East, or those of Italy.

If it be answered, that in many of the matters to which a brief reference has just been made, it is not desirable that the present day should run a race of diligence with a distant antiquity; let us turn to the fine arts, and enquire how the present stands with the past, in reference to them.

If we seek of Poetry the "thoughts that breathe and the words that burn," we shall not find those of the most powerful character among the writings of the author of *Childe Harold*, nor in the contrast furnished by the "Lake school."

Music numbers among her professors, in our time, names of great distinction; but if we ask for one of her grandest choruses, or some of her softest and sweetest strains, she may point us to the age which has past.

If we search for the most valuable specimens of Painting, we shall be referred to a still earlier date.

Sculpture inscribes, with a just pride, upon the roll of her great names, that of one whose birth-place is almost within the circle of our present vision;\* but he has gone to study the works of the great artists of other centuries.

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\* Powers was born in Woodstock, Vt.

The standard orders of Architecture, will not be found in the capitols, or state-houses, or city-halls, erected at the present time.

And the art of Engraving, in some of its branches, was carried to as great perfection thousands of years since, as it is in our day.

It may be said, in relation to the fine arts, that there is, in some respects, a standard of excellence which cannot be surpassed, and that it has already been reached in many particulars; or if not so, that it has been so nearly approached, that only the most gifted minds, such as appear but once in a hundred, or a thousand, years, can come into the competition. And it may be urged, that it would be unjust to compare the present, consisting of its single age, with the long past, numbering its thousands of years; and to condemn it, because the single age does not present a roll of great names, or a record of great achievements, equal to those of all former times. It would be so.

Leaving then all the memorials of ancient ages respecting which an attempt at emulation might not be regarded as useful progress, and waiving the further consideration of all those matters where it may be supposed that our predecessors have attained, or approached, the desirable standard; let us turn our enquiries towards the character and progress of the race, in some departments, respecting which no such uselessness can be alleged, and no such pretensions of the excellence of former times advanced.

With the Christian world, generally, this earth carries a date of something more than 5800 years.

Whether the speculations of some geologists have shown that the period, thus stated, is not to be measured by the ordinary signification attached to the terms of such a computation; or whether they have proved, that before the chaos which preceded it, this globe had been inhabited by some organized forms of matter, is not material to our present purpose; nor, it may perhaps be said, to any other useful

purpose. And it may be added, that a law of life, which should lead to progress from one genus of animated existence to another, would be little less miraculous than an independent creation.

The "vestiges of the natural history of creation," however distinctly they may appear to some to be marked, and however clearly they may be supposed to show organic progress, present to us nothing, of an early date, relating either to physical or moral man. It is only through the medium of the Scriptures, that we possess the knowledge of his early existence, and the history of his acts for many centuries after we are thus taught that he was created. These exhibit him, during that period, in his religious, moral, and social character, and incidentally mark his progress, or his want of progress in civilization. And with this, the only record, before us, we can have no desire to believe that the race has existed for a longer period than that assigned to it by that record, reckoning according to the usual mode of computation.

The history of the first two thousand years of the world, is written upon a few pages of the sacred volume, from which we learn, that during that period the earth was corrupt and full of violence. It needs no pen of inspiration, to lead to the belief that this record is true. If we allow this two thousand years to be a sufficient time for what has been called the boyhood of the race, (and it is quite enough if we live, as we are inclined to believe, in its manhood,) and if we then enquire respecting its advance towards its meridian; we shall trace the people of Israel destroying nations more corrupt than themselves; and subsequently the different divisions of that people making relentless war upon each other, sparing neither age, sex or condition. And we are tempted to exclaim, if these are the people whom God chose out of all the nations, as a people to serve him, what must have been the moral condition of the heathen, by whom they were surrounded.

If we pursue this enquiry through sacred, or profane history, we shall find that the possession of power, (and wealth as the means of its possession,) have been considered, in all ages, the matters most wor-

thy of attainment. And if we seek to know how power has been used when possessed, we must be told, that among nations, its most usual manifestations have been in waging war, and among individuals, in inflicting oppression.

Successful war has been generally considered to be the greatest glory of kings, and those who have acquired the surname of Great, are, usually, those who have destroyed the greatest numbers of their race. Alexander the Great is said, in his early youth, to have showed the marks of a great character, for when he heard of the victories of Philip, he exclaimed, "my father will not leave me anything to do." The indications of a great character, it seems, therefore, are to be found in this early opinion, that battle, carnage, and the prosecution of conquests, were the only occupations fit for a monarch. And in accordance with this opinion, from the period when the Israelites entered the land of Canaan, to the pacification of Europe on the downfall of Bonaparte, and even to the present time, there have been, almost constantly, in one quarter of the world or another, the sounding of trumpets, the neighing of war-horses, the shouting of captains, and all the pomp and circumstance of, what is usually termed, "glorious war."

Ages and ages before the intelligence of man had acquired knowledge of the fact that the blood circulated through the human system, his violence had spilled oceans of it, and drenched the earth with gore.

National glory has been made to consist almost altogether in the success of national arms. No matter what the occasion;—no matter how unjust the quarrel;—success has been glory. The greater the havoc the greater the glory. Thousands and thousands of men have been swept from the earth in a single day, by a great battle, and the cries of the widows and orphans have been regarded as of no greater moment than the wailing of a child. They have been drowned in the shouts of victory and rejoicing.—Whole provinces have been devastated, and the unoffending inhabitants have been driven from their homes, their habitations destroyed, and their fields wasted;—fire, mur-



der, and desolation marked, at every step, the progress of the invaders;—but the world took little thought of these things, while bestowing its admiration upon the energy, and warlike accomplishments, of the great captain who directed the operations.—Cities have been beleaguered; men, women and children, shut up within the walls, and subjected to all the horrors of bombardment, starvation, storm, sack, and pillage; and the nation which has done the deed has raised the shouts of jubilee, and the songs of ‘Te Deum.’

The spirit of warfare has pervaded, in a greater or less degree, the length and breadth of the whole world. “All high titles,” it has been said, “come hitherto from fighting.” And some of the most favorite of the metaphors of the church, are those which represent the Christian as “girding on his armor,” “pressing forward to the battle,” “engaging in the conflict,” “and contending for victory.” And this again operates reflectively to excite a similar spirit in those engaged in the daily avocations of life.

Notwithstanding the lapse of more than eighteen centuries, since the promulgation of the peaceful precepts of Christianity, it is to this day one of the greatest boasts of a nation, that it is renowned in arms.\* And by this part of its vainglory, it is not meant, merely, that it is resolute and successful in protecting itself from aggression.—The present century has certainly witnessed some of the most stupendous, and wholesale, butcheries, which have ever been perpetrated; and the leaders in them have been almost idolized, and worshipped, not by their respective nations alone, but by great portions of the rest of what is called the civilized world.

Our own country has not escaped from the excitement attendant upon this love of warfare and military fame. Beginning with a pardonable, and I am willing to admit a laudable, pride in the success of our struggle for freedom; and following that achievement with the bells, bonfires, and shoutings, with which it was predicted that the

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\* Mr. Van Zandt, in a diplomatic despatch addressed to Mr. Webster, speaks of a war conducted on Christian principles! It may well be asked, what war was ever so conducted, on both sides, or on either side?

anniversary of our memorable declaration would be celebrated ; we have not been content with the rejoicings which might commemorate the patriotism and heroism of the fathers, fighting in defence of their just rights ; and which might thus inspirit the sons to maintain them with equal determination, and if necessary with still greater sacrifices.—Passing this limit, we have been prone to indulge in arrogant boastings of our strength ; in ridiculous, were it not mischievous, gasconade with regard to other nations ; and in the cultivation of a martial spirit, not in defence of our altars and hearths, but one which was ready, and seemed somewhat desirous, to meet the world in arms, when, how, and upon whatever occasion it dared.

The gratitude, which delighted to honor the fast failing remnant of those who rallied around the standard of freedom in its day of imminent peril, has been pressed into the service of military renown acquired upon other fields ; and the time seems to be approaching, if it has not already arrived, when the huzzas which chronicle warlike exploits, are to be regarded as so many suffrages to invest the military commander with civil office.

It is already stamped upon our history, in indelible characters, that in this government of the people, (which should certainly be the best government in the world,) the candidates of both of the great political parties which divide the country have been selected, with especial reference to the popularity which they possessed as successful warriors ; and the appeals which have been made to the people to elect them to the highest civil office in the nation, have been met with an enthusiasm which must very naturally excite in other aspirants a desire for new fields of conflict, on which new claims to favor may be sought and won. And it is but within a few days, that successful battles, although necessarily upon a small scale, have been heralded through the country with almost as great rejoicing as if the national safety depended upon the result, and meetings were forthwith called for the purpose of nominating the commanding general as a candidate for the Presidency ; one of which it is understood carried that purpose into effect.

With the merits or demerits of our recent and present controversies with other nations, involved as they are in the political strifes of the day, I have nothing to do upon this occasion. But the spirit of the cry which has lately rung through the country, "The whole of Oregon or none," and which has pressed our claims to the extremest limit, reckless of consequences, is one which calls for the profound consideration of all who desire that their country should be peaceful and just, as well as powerful.—Our title to territory has, within a short period, and in the halls of our national legislature, been based upon our alleged destiny; and the example of the Great Frederic, who sent his ambassador to urge stale claims to a coveted province, and at the same time entered that province with his army, carrying havoc and devastation among its inhabitants, has been there cited, if not by way of example for our action, at least by way of illustration of the spirit which should actuate us.

There is another cry, which is, even at this time, spreading through the country, and which carries upon its face a specious appearance of patriotic zeal; but it has its prototype in the elevated morality of the Scotch sutler woman, who, upon the eve of a battle, rebuked the prayer of her companion, that God would stand by the right, as a wicked wish; and put up her own fervent ejaculation, "God stand by Hamilton's army, right or wrong."

As we might well expect from the belligerent and selfish spirit which has characterized mankind, we hear little of national benevolence. And although national justice is ever upon the tongues of monarchs, and chief magistrates, and legislators; it is in truth more often invoked by the weaker, than carried into exercise by the stronger party. National justice is not often permitted to stand in the way of national aggrandizement, if no more powerful obstacle be interposed.\*

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\* How much of national morality and justice is shadowed forth in the following extract from the Charleston Courier, which is found in the Boston Bee, Vol. 4, No. 16?

What progress the present age has made in regard to war, and right, and justice, may be learned, among other things, from the subjugation of Poland by Russia;—the wars upon the Siks, and other East Indian nations, by Great Britain;—the invasion of Algiers, by the French;—and the expatriation of the Cherokees, and Seminoles, by the United States. And if other subjects of a kindred character are sought, they may readily be found.

I shall not be misunderstood. There is much in our free government, and in its administration, that may well elicit the heartfelt exclamation,

“This is my own, my native land.”

I would not have that land powerless, and unable to repel aggression. The precept, that if smitten on one cheek we should turn the other also, was not, in my view, intended as a literal command never to resist injustice. It is no part of my belief that the American Revolution was, of itself, at war with the injunctions of the gospel;—or that Poland was bound tamely to submit to subjugation, without a struggle for her existence;—or that the Cherokees were required, by Christianity, to be driven, unresistingly, like Hagar, into the wilderness, with little more than a crust of bread, and a bottle of water for their sustenance. The Jew who asked his pound of flesh, because it was so nominated in the bond, had at least the voluntary obligation of him whom he pursued, but the bond to the free and enlightened nation

**THE COURSE TO BE PURSUED.**—The Charleston Courier says “we must, to insure reparation for past injuries, and protect ourselves from future aggression, “Conquer Mexico,” and then **MAKE OUR OWN TERMS**. Let us *then* be as liberal as the most extended philanthropist might desire. Let the *weakness* of Mexico *then* come into account. If we have acted unjustly or rapaciously towards her *then* will be the period to acknowledge it. But we repeat, “Conquer Mexico” first.”

If we have acted unjustly or rapaciously towards Mexico, burn her towns, lay her territory waste, kill thousands of her inhabitants, and then, having through our strength and her weakness reduced her to subjection, acknowledge the injustice and rapacity which preceded all this, and make our own terms!

The Charleston Courier is a paper of some note, and doubtless claims to be respectable.

which held the destiny of the Cherokees in its hand, was an obligation of a much more questionable character.

It is well for us all to recollect upon what occasion, and by whom, it was said, "My eyes have grown dim in the service of my country, but I never doubted its justice." Can we, at this day, give utterance to the same expression of confidence; or shall we be forced to adopt the language of an eminent statesman of another land, and exclaim, "I tremble for my country, when I reflect that God is just."

The prophet of old, in describing the merchandize, and magnificence, and pride, of ancient Tyre, enumerates, among her merchants, those who "traded the persons of men in her market."\* Do we enquire what progress has been made, in the thousands of years which have intervened, towards the suppression of this odious traffic; which disregarding the rights of the weak, wrests them forcibly from their homes and their friends, loads them with fetters, casts them into prisons, and crowds them into the holds of vessels too small to furnish them the breath of life;—which fills up their passage across the ocean with horrors too numerous, and too revolting to be detailed;—and finally disposes of them, like beasts of draught and burden, in the markets of other countries?—We too shall be told of the glorious efforts of Great Britain for the suppression of this trade, and the fact that it has been declared piracy by the most powerful maritime nations, our own included. Our attention will be called to the hundreds of thousands who have been manumitted in the British colonies, and to the memorable self-evident truths set forth in our declaration of independence, "that all men are created equal; that they are endowed by their Creator with certain inalienable rights," and "that among these are life, liberty, and the pursuit of happiness."

And we shall discover, also, that these powerful maritime nations, "whose flags are thrown aloft upon every ocean, and whose canvass swells to every breeze," although they permit no other piracy long to

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\* Ezekiel, Chapter 27.

continue, have not succeeded in suppressing this kind ;—that the hand which is apparently stretched out against it, often appears to be stricken, as it were, with paralysis ; while great efforts have been made to prove, that the emancipation of the slaves in the British West India islands has been attended with ruin to the slave, as well as to the master.

And, by way of commentary upon our recorded declaration of rights, we shall be made conscious that a portion of these United States, if it cannot rival the magnificence of Tyre ; if it spreadeth forth no “sail of fine linen, with brodered work, from Egypt,” nor covereth itself “with blue and purple from the isles of Elishah ;” can yet compete with that renowned city in trading the persons of men in its markets ;—that it holds three millions of them in bondage ; and devotes its most vigorous efforts, to extend an “area of freedom” of this very peculiar character. And we may, perhaps, also believe, that we are entitled to the pre-eminence of being the first nation, in which the mighty intellect of some of its prominent statesmen has been devoted to a formal justification of this revolting relation of compulsory personal servitude.

We boast of the extension of commerce ;—of the opening of new marts for merchandize ;—of new sources of wealth ;—and of the civilization consequent upon this commercial intercourse. And to a certain extent this is matter for gratulation.—But the luxury of commerce, and the selfishness of commerce, unless counteracted by some more powerful antidote than has yet been applied to them, so far as the mass of its followers are concerned, may make this extension of commerce a curse, instead of a blessing, to the nations.

We have seen something of this extension of commerce, within a very short period, by the opening of the ports of China, to a more extensive traffic. The effects of it upon the Chinese character remain to be developed. But the means through which a greater commerce with China has been obtained, and the occasion which gave

rise to the use of those means, must remain an enduring reproach upon one of the most civilized nations of the earth.

If the civilization of commerce is to be extended, by smuggling a deleterious and intoxicating drug into a country in violation of its laws, and then by a war waged against that country on account of its exertions to enforce those laws, resulting in a compulsory introduction of the means of intoxication and death; we might almost say, better, far better, were it, that the benefits of commerce should never be extended to her borders.

The people of China, notwithstanding her heathenism, have been governed by principles which may well put to the blush the most civilized or religious nation upon the earth. And it is a melancholy reflection, that the extension of commerce, and a greater intercourse with Christian nations, will not give her a purer system of morals, or more magnanimous principles on which to conduct the matter of bargain and sale.

National morals of trade, as exhibited by the Defender of the Christian Faith, in the instance of China, have found a counterpart on a smaller scale, in the proceedings of His most Christian majesty, or those of his subjects, in the Pacific.—Civilization has been carried to a small island in that ocean, not by opium and the sword, but by the peaceful labors of the missionaries of the cross. The debased and degraded savage, upon whose passions no principle imposed any restraint, and whose social and intellectual condition was but one remove above that of the brutes, rose from his degradation, instituted a government, administered laws, rendered to his neighbor the things that were his, and claimed a humble rank among the nations. And to secure himself in this position, he endeavored to exclude the exciting cause of much of his former vice and brutality.—And in what spirit has this effort been met, by the morals of trade, among those who boast of the name of Christian?—I pass by the attempts on the part of individuals to counteract this peaceful spread of civilization, and present to you the authorities of France, compelling this people to admit the means of intoxication, manufactured in that country, be-

cause a profit would thus accrue to the subjects of his most Christian Majesty. Alas! If by the term Christian nation, it be meant one that attempts in any remote degree to regulate its intercourse with others by the precepts which the gospel prescribes to individuals, we may well exclaim that there is not a Christian nation upon the face of the earth.

But we need not seek the morals of trade, as they exemplify themselves in our day, in China, or in the islands of the Pacific. We have seen, within our own borders, a mighty effort for the improvement of mankind, in this same particular, by suppressing the means of intoxication. Proof upon proof has been accumulated of its agency in producing crime, misery and death. And how this effort has been met, in general, by the morals of trade, you are all very well aware.

I must not detain you by adducing farther evidences to show, that the spirit of accumulation, in the latter ages of the world, although it must be admitted that it is more active, and has more votaries, is actuated by no higher or holier motives than it possessed in past ages. With all our progress, we have not elevated the morals of trade. Our inventions do not reach to this. At this day, as in more ancient times, "It is nought, it is nought, saith the buyer," but it is not always, after he has gone his way, that he boasteth of the good bargain that he has made. The seller of our time is as dexterous in recommending his wares, as is the purchaser in depreciating them.

Let it be understood that I speak of the general rule, and not of the many noble exceptions to that rule, when I say, that parental education has a direct influence, if not by verbal recommendation, yet by the force of example, and its accompanying influences, to train up the child to selfishness and unworthy ambition, often to fraud, and sometimes to crime.—The chances are ten to one, I had almost said ten thousand to one, that the motive first presented to the infant mind, as soon as it is capable of understanding and acting upon a motive, will be a selfish motive. He is thus taught to be shrewd in his little traffic with his fellows, and he is fully prepared, on his entrance into manhood, to act upon the maxim of political economy, that we should



buy cheap and sell dear. The individual thus taught, if he possess more than an average share of intellect, unless he overreaches himself, is continually accumulating by means of his good bargains; which are often but another name for contracts in which he has overreached some less shrewd neighbor;—and numbers, (perhaps nearly one tenth part,) of the community, in this land of equal rights and equal laws, are kept constantly struggling for a subsistence, during a whole life, by the good bargains which are purchased from them, either in their property or labor, by the greater sagacity of those with whom they deal.

It must not be supposed that what I have said of the morals of trade is intended to apply exclusively, or even principally, to mercantile men;—or that I deem mercantile pursuits less worthy than any other of the occupations of life. The morals of trade, to which I refer, exhibit themselves among all classes and conditions of the community. The pursuit of wealth, for the sake of wealth, among all classes, is as ardent and unscrupulous, and is made the final end and aim of existence to as great an extent now, as it has been in any age. The apostolic injunction, that no man should “seek his own, but every man another’s wealth,” is literally obeyed, by great multitudes, as they seem to understand it.

I condemn not the pursuit of wealth as a means to noble ends;—as a means wherewith the hungry may be fed, the naked clothed, public institutions fostered, and the gospel preached to the poor;—but that pursuit which seeks money from the desire to lavish it on luxury and pride, or to hoard and gloat over it with a miser’s affection.

How few of the great fortunes, which are accumulated by the toil of a life of business, do other than contract the spirit, or pamper the pride of the possessor; give him the means of personal indulgence according to his taste, and furnish the source of quarrels and extravagance among his heirs. We meet, at rare intervals, an Earl of Dartmouth, a Phillips, a Hall, a Reed, and an Appleton;\* men

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\* Benefactors of Dartmouth College.

who understand the true uses of wealth ; but where the world is blessed with one such benefactor of his race, hundreds crowd its thoroughfares, who with ample means to aid in the true progress of mankind, yet die "and leave no sign."

We exult in the discovery of the art of printing, and the multiplication of books, periodicals, and newspapers, and we see in this powerful means for the diffusion of intelligence, a sure guaranty against the return of the dark ages.

But the Goths were not altogether ignorant ; and it has been questioned whether their barbarism was not preferable to the Roman civilization of that period. And it yet remains to be proved, that the diffusion of knowledge, by means of the art of printing, will prevent war, violence, and oppression, or purify and elevate the morals of a corrupt civilization.

The press is a mighty engine for good ; but if once enlisted in the cause, it is equally potent for evil ; and it will lend its influence to the former, or the latter, as other influences shall be brought to bear upon it. Its Paul Cliffords, and Jack Sheppards, may do more to corrupt the morals of youth, than can be counteracted by twice the number of pages devoted to intellectual and moral improvement.

Besides, if the eighteenth century was rightly characterized as the age of superficial learning, because, among other things, of the unprecedented circulation of magazines, literary journals, abridgments, epitomes, &c., particularly during the last half of it ; what shall be said of the present, when novels, magazines, tales, and newspapers make up of the sum of the reading of a great portion of the reading community. It is not too much to say, that in this country, at the present time, a respectable public library, of standard literature, cannot be sustained out of the walls of our literary institutions, or the limits of some of the larger cities ; or if perchance there may be here and there one maintained, by the benevolent contributions of a few, it is to stand in a great measure unread.

In forming an estimate of the present compared with the past, we must not forget the efforts now made, to educate the mass of the people, of which so much is said and written. But how few comparatively take much thought in this matter. It may, perhaps, not consist with our self complacency, to enquire, too curiously, how far, even we of New England, are indebted to the spirit and example of the Pilgrim fathers, for the incitement to what is here accomplished, at the present time. And were we to compare what was effected in their days, with what was done but a few years ago, we might well blush that our efforts corresponded so little with the enlarged means which were at our disposal.

Nor must we be unmindful of the benevolent efforts which have been made, in our own day, to spread civilization, and Christianity, among distant nations. I would not forget the self-sacrificing spirit of those, who have braved the "perils of the deep," and the "perils among the heathen;" taking their lives in their hands, an offering, if need be, on the altar of their faith. Among these halls of learning, and especially with some of us assembled upon the present occasion, Poor, the missionary of the cross, and subsequently the President of a college at Battycotta, in Ceylon, may claim a high and fresh remembrance. But along with the contemplation of these efforts to advance the intellectual and moral condition of the world, comes again the reflection, how small a portion of the community take any active interest in them; and that, in many instances, the aid which is afforded will not come within the pale of that love which we are taught to believe is bestowed upon a cheerful giver.—The fact that it costs about twenty-five per cent of the benevolent contributions of the country, to collect them, may serve to show to what an extent even benevolence is "forced to go a volunteer."

It is readily seen, from this hasty, and necessarily imperfect review, that the progress of the world in ethics has not kept pace with its mechanical inventions, and its scientific discoveries. And if we seek for an explanation of the fact, we may find it, in no small degree, at least,

in the motive power which has incited to the progress of which we boast. No small portion of that progress, it is apparent, has its rise not in the greater influence of morals or religion ;—not in any higher patriotism or love of country ;—nor in any greater benevolence ;—but in a greater desire in the many for the acquisition of wealth, and in the few for the possession of distinction also.

It is the latter which fills the legislative halls of this, and other nations, with those patriots who are ready to embroil their country upon some cavil about “the ninth part of a hair,” and then blazon forth as their patriotic motto, “our country right or wrong.”—It is this, which furnishes to the ranks of anti-slavery societies, some of those, who in their efforts to “go a little farther than he who goes farthest,” denounce all the constitutions and laws, which recognize the existence of involuntary servitude, as of no binding force ; and call upon magistrates, sworn to the faithful execution of the laws as they exist, to disregard their official oaths and duties.—It is this, which is loudest in its appeals to juries to set aside the law of the land, (no matter whether upon the subject of capital punishment, or temperance, or military fines, or any other subject,) because those laws conflict with the particular notions of right entertained by the party making the appeal ; and which, in the pursuit of notoriety, would thus introduce anarchy and confusion into the administration of justice.—It is this, which provides the non-resistants with some of those prominent file-leaders, who resist every thing but their own peculiar modes of thinking, and who put the non-resistant powers of others to a test beyond their endurance.—And it is this, which fills the country with ultra-isms of other descriptions, religious, political, social, and agrarian.

Let us not deceive ourselves. We shall have ill read the lessons of the past if we study only those which administer to our self-gratulation, or our confidence in our national progress.

It is not in the inventions of the day ;—it is not in the numbers of the manufactories that spring up upon our waterfalls ;—it is not in the commerce that finds its way to all the ports of the earth ;—it is not in

the improved modes of tillage;—it is not in the greater population that the earth is supporting by means of these improvements;—it is not even in improved modes of intellectual cultivation; nor in the facility for the diffusion of knowledge through the medium of the press; nor is it in the greater personal freedom that may exist; or the military glory that may be acquired;—it is not in any, nor all of these, that we can surely find the progress of man to his true dignity. They are all of them, in themselves, consistent with the worst possible state of society, and the most corrupt condition of the race.

Nor is there in any, nor in all of these things, any sure guaranty for the stability of the progress which we may make. The world, from its creation, has been marked by change, in all things relating to the political and social condition of mankind.—Empires have risen, and flourished, as it were but the more signally to mark the catastrophes by which they have been overwhelmed.—The sands of the desert are swallowing the ruins of the wonderful temples of Thebes; and the royal sepulchres in the mountains around her, splendidly adorned with paintings and sculpture, serve as a shelter for the miserable Arab with his dogs and goats.—Of the lives of the embalmed tenants of those sepulchres, no intelligible record remains to elucidate their history.—Babylon the great, the glory of kingdoms, with all its population, and wealth, and magnificence, has passed away; and its site is a harborage for bats, and owls, and wild beasts.—Petra, in the lonely desolation of arid sands, and sterile mountains, stands a most impressive, but almost unknown monument of the utter insignificance of such labors, for the enduring prosperity of a people.—And the literature and eloquence of Greece, and the civilization and refinement of Rome, furnished no protection to their political institutions.

The promptings of ambition alone will not teach man what is real progress, nor instruct nations in what true honor consists.—An overweening estimation of our self-importance, and a principle of right which regards exclusively our own convenience, will not lead to our own improvement, nor aid in that of our fellows.—And it is not by fostering national pride, nor boasting of national strength, nor relying

upon that strength to sustain national glory, that we shall promote national justice, or any other national virtue.

It must be admitted that the considerations which I have thus presented upon your attention have nothing of novelty in them, and are not of a very flattering character; but they are presented from no disposition to indulge in a tirade against humanity, or to gratify any moroseness of spirit. The end and the purpose of them is, to counteract, so far as the occasion may admit, the vain and boasting humor, and the pervading selfishness, which constitute such formidable impediments to true progress; and to lead to the enquiry whether there be any hope of a redemption from the causes which produce such results; and if there be, from what source the impulse must come:—where is the mighty lever which may move the world.

Upon the first branch of this enquiry, I would that the signs of the times were more auspicious. I would that there were not so many evidences, even in our own country, to support the belief that there is no counteracting influence, short of miraculous interposition, of sufficient power to effect that redemption.

But there is still a foothold whereon to stand, at least for the effort. It is not the work of a day. It will not be accomplished in our time, nor in that of any generation that shall soon follow;—but there are omens and promises of final success, which encourage to perseverance in making the attempt.

And how may this work possibly be accomplished?—Not by appeals to manhood, to cast aside the selfishness and ambition which education has made part of its very nature.—Not by calling upon him who is already engaged in the active strifes and competitions of the world, and who already regards those whose interests are not coincident with his own, as antagonists, and enemies, to convert the bitterness which has been engendered by those clashing interests, into affection and respect.—Not by arguments addressed to the successful politician, excited by the strife of the recent canvass, to induce him

to make the golden maxim the rule of his administration.—As well might we ask the warrior, while on the battle-field, flushed with his recent victory, to sign the constitution of a peace society, and turn his armory of death into the instruments of peaceful labor.

If the hope of improvement is ever to end in fruition, it must be by a reform in the systems of education, which are, in fact, chargeable with much of the evil.—It must be by beginning with the child, and eradicating from the mind of infancy the selfishness which exhibits itself among its first actions;—by training the youth to a just estimate of the rights of others, as well as of his own;—by instilling into his mind an abhorrence of that love of self, which leads to injustice to his fellow men;—by inducing him to regard with loathing that ambition which seeks its gratification by paltry triumphs, or appeals to the passions and prejudices of the people, instead of a fair, honest, and magnanimous course;—by convincing him that it should not be the first object of life to marry a fortune, and the second to obtain an office;—and by sending him forth, a candidate for manhood, thoroughly imbued with a love of honor, justice, and peace, at the same time that he is thoroughly versed in science, and literature;—willing to follow the right, and the true, when seemingly in conflict with the expedient;—and thus to seek the accomplishment of noble ends, by means of a similar character. And this is consistent with a worthy ambition, and a reasonable desire for office, honors and distinction.

It has recently been urged that there should be a greater infusion of morals into the education of our common schools, and this has been inculcated with a force and ability not to be surpassed.\*

This is, however, only part, and a small part of the reform which is required. There must also be a better ethical training around the domestic fireside, and in the daily transactions of life. Parents must be made more fully aware of the influences they themselves exert. But the impulse to this reform in education must not be sought, in

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\* Report of Hon. Horace Mann, Secretary of the Board of Education in Massachusetts, published in the Common School Journal, April 1 to July 15, 1846.

the outset, under the parental roof. That must be elevated and enlightened from other sources, and when this shall be done, it will become a most efficient, as it is an essential, auxiliary, in carrying onward the great work.

Nor can we look to the primary schools as the pioneers in a successful reformation.—When the instructors of those schools shall have become fully imbued, as they are beginning to be, with its principles, they will have a vast and an abiding influence in pressing it forward to its completion.

If such a reformation in the modes of education is to be accomplished the impulse must be given by the higher institutions of learning and by those who go forth from their hallowed precincts.\* There is the place to stand.

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\* It gives me great pleasure to be able to adduce, in the following extract, a very distinguished authority, in support of some of the views I have expressed.

“The understanding in every department of speculative or practical knowledge has advanced of late years with a vigor and success beyond what the world has witnessed at any other period ; but I cannot suppress a painful impression that this intellectual improvement has not exerted, and is not exerting, its natural influence in purifying the moral character of the age. I cannot subdue the feeling, that our modern Christendom, with all its professions and in all its communions, is sinking into a practical heathenism, which needs a great work—I had almost said a new dispensation—of reform, scarcely less than the decrepid paganisms of Greece and Rome. Christians as we are, we worship, in America and in Europe, in the city and the field, on the exchange and in the senate, and must I not add in the academy and in the church, some gods as bad as those of the Pantheon. In individual and national earnestness, in true moral heroism, and in enlightened spirituality unalloyed by mysticism, the age in which we live is making, I fear, little progress ; but rather, perhaps, with all its splendid attainments in science and art, is plunging deeper into the sordid worship of

“the least erected spirit that fell

From heaven, for even in heaven his looks and thoughts

Were always downward bent, admiring more

The riches of heaven’s pavement,—trodden gold,—

Than aught divine or holy else enjoyed

In vision beatific.”

“It may be feared that a defect of this kind, if truly stated and sufficiently general to mark the character of an age, will prove too strong for any corrective influences but those of public calamity, and what are called, in our expressive na-



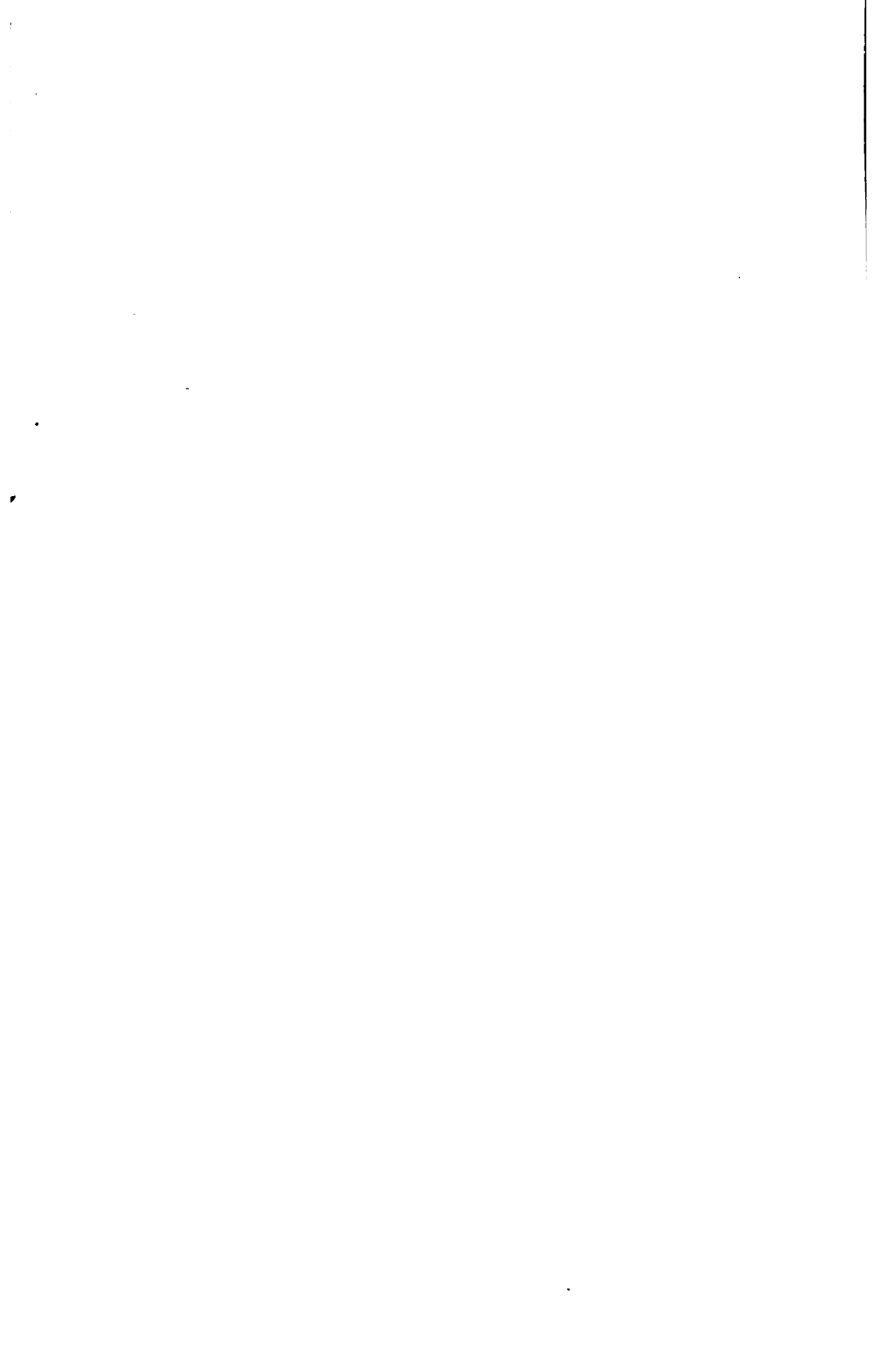
The influence which those institutions have heretofore exerted, in this respect, if it has not in some instances been positively adverse to a sound ethical education, has been neutralized by the mode in which intellectual cultivation has been too exclusively pressed. But if they will make a united effort to improve the system of education, they may move the whole earth. And if all be not, forthwith, realized, which may be desired, incalculable benefit must result from the attempt. The influence of such an effort will be immediately felt in the school of the domestic fireside; and in all other places where youth are trained, wherever they may be found. Literature will be purified from its stimulus to seek for national glory through war and violence;—from its incitement to the acquisition of distinction, without regard to the means by which it is to be reached;—and from its encouragement to the pursuit of wealth as an end, instead of a means.

Union of purpose, and union of action, among those institutions may be attained, whenever a profound conviction of its importance and necessity shall pervade them.

And may we not hope that the Institution around which we are gathered, and whose anniversary we have come hither to celebrate, in its efforts to suppress undue emulation, has already taken the first step in this reformation; and that the work itself shall go on, prospering and to prosper, until its beneficent effects shall extend over the whole land, and be carried to the remotest corners of the habitable globe.

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tional phrase, "the times that try men's souls." But I have long thought, that if, in a period of prosperity and by gentle influences, any thing can be effected toward the same end, the work must be begun in our seminaries of liberal education, and that they have a duty to perform, in this respect, which cannot be too strongly urged nor too deeply felt." *Inaugural Address of Hon. Edward Everett, as President of the University of Cambridge, p. 55.*









⑦  
Mr. Sibley  
with the respects of  
J. Parker

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DANIEL WEBSTER

AS

A JURIST.

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②  
DANIEL WEBSTER AS A JURIST.

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AN

# ADDRESS

TO THE

STUDENTS IN THE LAW SCHOOL

OF THE

UNIVERSITY AT CAMBRIDGE.

BY JOEL PARKER, LL. D.,  
ROYAL PROFESSOR.

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"Vera pro gratis."

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ᄒ CAMBRIDGE:  
JOHN BARTLETT.  
1853.



1877, Sept. 1.  
Recd of  
Rev. John L. Sibley,  
of Cambridge.  
(16. 20. 1825.)

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## N O T E .

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As some allusion is made in the following Address to the circumstances connected with its delivery, it may be proper to state, that after the death of Mr. Webster the students of the Law School requested the author, at such time as might suit his convenience, to address them on the life and character of Mr. Webster, and he assented, with the understanding that the Address should be delivered in the usual Lecture-room in Dane Hall, instead of an ordinary lecture.

The students subsequently procured a full-length portrait of Mr. Webster, and placed it in the Lecture-room, by the side of portraits of Judge Story and Chief Justice Marshall, and the Address was then delivered.

At their request it is now printed.



## A D D R E S S .

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GENTLEMEN OF THE LAW SCHOOL:—

WE deviate, to-day, from the ordinary discussions of this place, that we may pay a further tribute to the memory of one who but a short time since held a commanding position in our chosen profession,—one who, if not in such fulness of years as we desired to have witnessed, yet, after the lapse of the ordinary limit of human life, now “sleeps well” in the silent dormitory of the dead.

You have fitly desired to do such honor as you might to him, whom you have rightly regarded as one of those greater luminaries who have “ruled the days” of the law, and whose light is not extinguished by the providence which has removed him beyond the horizon which limits our present vision.

Upon the occasion of his death, you shrouded our edifice in the emblems of that mourning which was

not of mere outward show, but which pervaded your hearts. And you have now placed within the hall of our daily studies a striking portraiture of his personal presence, that his merits as a lawyer may remain in fresh remembrance, not only with us who now occupy its precincts, but with the succeeding generations, which we fondly hope will fill these seats when we shall have followed him whom we now honor to that final judgment which is subject neither to error nor appeal.

In complying with your resolution, requesting me "to address the School upon the Life and Character of Mr. Webster," I propose to confine myself almost exclusively to that portion of them which had its connection with the profession of the Law. The terms of the resolution might open to me a wider range, for Mr. Webster's life presents him as a jurist, a statesman, a diplomatist, an orator; but your committee have well remarked, that "his prominent position as an advocate and a jurist has, perhaps, been somewhat hidden by his later and more conspicuous renown as a statesman," and it is particularly fitting that in these halls we should render to his memory a professional homage.

For his character as a legislator, a statesman, a diplomatist, there are other forums and places of eulogy. From the halls of Congress, from the places specially appointed for funeral obsequies,

and from the pulpit, there have been eloquent tributes to his character and services as a statesman and orator; but brief indeed are the pages which have attempted to portray him as a jurist.

In the legal tribunals, upon the occasion of his death, the loss which the profession and the community had sustained was depicted in words that shadowed forth the deep feeling which pervaded the country, and eloquent lips rendered due homage to his intellectual greatness, and sketched, in general terms, his labors and services in the cause of jurisprudence along with his merits as a statesman, an orator, and a man.

These memorials, brief as they necessarily must be, are usually all that remain to us of the members of the profession, except the abstracts of their arguments scattered through the volumes of the Reports.

But of one so distinguished, we very naturally desire to know something more than can thus be placed upon the record, — something more in detail of his student's life, — of his entrance upon his profession, — his success, — and his rise to that eminence which made his counsel sought, and his services required, from the banks of the Penobscot to the mouth of the Mississippi; and we inquire what was his training, — what his course of argument, — his style, — his peculiar mental characteristics, — his professional deportment.

We desire to study his character, and not to dismiss it with the tribute, however able and eloquent, of the passing hour which tolls his knell.

The duty which I have assumed does not require me to speak, except in general terms, of the events of Mr. Webster's early years. His character as a jurist dates no farther back than his entrance into the office of Mr. Thompson, immediately after his graduation in 1801.

But it may be stated, and it should be stated, as a word of encouragement to the hopes of the student, and to dissipate some of the fears which may beset him, that there seems to have been nothing in Mr. Webster's boyhood essentially differing from that of many other of the young men of the country. The opinion of his mother, "that he would come to something or nothing, she was not sure which," is one which might be entertained of many a young man, who, with a strong love for reading and for poetry and an aptitude for acquisition unites a fondness for fishing and hunting, and perhaps no very strong desire for manual labor. And it is apparent that it was not the development of any precocious intellect, marking the boy as the father of his own mature age, that designated him for an education beyond that proposed to be bestowed upon the rest of the family.

The desire of the father to give his son the advantage of a collegiate education is one which he shared

with thousands of the yeomanry of the country, no better able to sustain the pecuniary burden of it, and the selection seems to have been made rather from a supposition that the constitution of this son was not robust enough for successful labor on a farm, than from any well-defined conviction that he was destined to attain any more than an ordinary elevation in a professional life. The strong wish of his father, at the completion of his legal studies, that he should accept the clerkship of the County Court, and the expression of his belief, that by his son's refusal he was about settling the mother's doubt, certainly does not indicate that his education had been with a sanguine expectation of great and immediate juridical distinction. And this may serve to show also, what seems to be the fair inference from all else which we learn of him at that period, that there was nothing in his collegiate course, however creditable it had been, which gave any undoubted assurance that he would attain an eminence above that of all his fellows. He stood among the foremost of his class, as is, of course, the case with a portion of all classes. This is true of some, I wish I might not say of many, who, after long lives of marked inefficiency, go down to their graves undistinguished by any approach towards a fulfilment of their early promise.

So of the earlier part of Mr. Webster's course of professional study. Mr. Thompson, in whose office



the first part of his novitiate was passed, and who had the character of an able lawyer, very competent to discover and estimate the talents and acquisitions of his pupil, however highly he may have judged of his capacity, had not, so far as I am aware, any anticipation of his future fame. Like other students, he found Coke on Littleton too hard a study for his comprehension at that day. "I was put to study," he said, "in the old way, in the hardest books first, and lost much time. I read Coke on Littleton through without understanding a quarter part of it. A boy with no previous knowledge on such subjects cannot understand Coke. It is folly to set him upon such an author. There are propositions so abstract, and distinctions so nice, and doctrines embracing so many conditions and qualifications, that it requires an effort, not only of a mature mind, but of a mind both strong and mature, to understand him. Why disgust and discourage a boy, by telling him that he must break into his profession through such a wall as this? I really often despaired. I thought I never could make myself a lawyer, and was about going back to the business of school-keeping." He took to reading Espinasse's *Nisi Prius*, and other, the most plain and intelligible works, which he could understand, and afterwards acknowledged his obligation to Espinasse for helping him out of this difficulty.

It was not until near the close of his studies, preparatory to his admission to the bar, and upon the occasion of his admission, that we have through Mr. Gore some evidence of the promise which was fulfilled in after years, a prediction of his future success, which derived its sure accomplishment from the determination of the subject of it, "that so far as depended on him it should not go entirely unfulfilled."

Prior to this event there had been years of earnest study, and it was this application and diligence, and the result of them as they manifested themselves to Mr. Gore, that led him, sagacious as you know him to have been, to foresee something of the probable future of his esteemed pupil.

Let not the import and design of these remarks be the subject of misconstruction. I have no disposition to deny or to undervalue the native intellectual powers of Mr. Webster, nor to insinuate that his earlier youth did not give all of promise that it should have given ; and I certainly do not mean to suggest, that, with a feeble intellectual organization, study could ever have made him what he was. But it is important that the truth should be understood and comprehended, that, however favorable to intellectual greatness might have been his original powers of mind, they had their development with severe training and hard study.

In one of the most able of the many eulogies which have issued from the press,\* the author, while he vindicates for Mr. Webster a transcendent intellectual power, says, "It is not necessary to deny, that in particular mental attributes he may have been deficient, either by nature or by practice, in comparison with some others. It may readily be conceded that he displayed less high intuitive perception of truth than Plato, less profound philosophical insight than Coleridge, less imaginative vividness and richness of conception than Burke, less metaphysical acumen than Edwards; and at the same time may be claimed for him, that in native original strength of mind, in what may be called naked intellect, he was equal to any of them." And he adds, "From some latent bias, perhaps, or from outward circumstances, this original intellectual force took in him a practical rather than a speculative direction, moved in the argumentative rather than in the intuitive process, the logical rather than the metaphysical method." The doubt implied in this last sentence you will readily solve, and will be at no loss to what cause to ascribe it, that the intellectual force took such a direction. The study and the practice of the law in which his mind had its principal training, until its mature manhood, are eminently of the practical, and argumentative, and logical.

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\* By President Woods of Bowdoin College.

The lawyer who should deal largely in the speculative, and intuitive, and metaphysical, would find that his means were not at all adapted to his ends. His science deals with facts to be ascertained, and principles to be investigated and applied. Mr. Webster was not a lawyer by intuition. I never yet heard of any person that was so. There may be, undoubtedly there is, a natural taste for the study of the science of the law, as there is a natural predilection for the study of philosophy, or chemistry, or poetry, painting, and sculpture. That the tendencies of his mind led him to that profession may be assumed, notwithstanding his early love for poetry, which finds small place in legal disquisitions, and the statement that he had an inclination for the study of theology.

But such a tendency of the mind, even with pre-eminent native powers, will not make any one a lawyer.

Mr. Webster was by no means ambitious of the reputation of having accomplished what he performed through the inspiration of his genius; but upon various occasions attributed what success had attended him to persevering labor, and enforced his recommendations of active diligence by a reference to his own practice. And it may be remarked here, that Mr. Webster's taste for his profession, or his study of it, was never extinguished by his other

tastes and pursuits. His mind was never so far withdrawn from the science of the law, as to change its character, or the character of its manifestations.

The occupations of a politician, especially of a party politician, do not necessarily demand a severe logic, nor are they always supposed to require a thorough knowledge of the principles of the law, or an undeviating adherence to any principles; but the politician who aspires to be a successful statesman, under a constitutional government, must adhere to logic and eschew metaphysics. With Mr. Webster, to be a statesman was to be a lawyer still. Much of his fame in that department in which he is most widely known, has been earned by his arguments and speeches upon constitutional law, and so intimately have law and politics been blended with him, that his labors in the latter department must be taken into consideration in forming our estimate of him as a jurist. In order to a correct appreciation of his character at the time of his admission to practice, we should understand that the bar did not then present numerous examples of laborious and persevering study. Fun and frolic ruled the hours of the evening, and in many instances cards held jurisdiction over the midnight hour, and the earlier hours of the morning; no very good preparation for the trial of cases on the day which followed. It must be admitted that the first half of the present century has not been sig-

nalized merely by steamboats and railroads, cotton-gins, and spinning-jennies. It has brought, along with these, marked changes in the habits of the people, some, perhaps, not for their enduring happiness. But of the beneficial influence of those which have been made in the habits and customs of the bench and the bar, there cannot be a difference of opinion. The leading reformer in producing this juridical revolution in New Hampshire was Chief Justice Smith. Mr. Webster early saw and predicted it to a near relative of the speaker; and with a joyous temperament, and a high zest for social pleasure, we have a striking exemplification of the decision of character which marked his future life, in the fact that the instance is not known in which he indulged in any of the dissipations of that time.

At that period the collection of debts formed a much more important branch of the business of the legal practitioner than it does at the present, and, except in the instance of a few leaders, the success of the lawyer was estimated by the number of actions which he entered at each term of the court. Tested by this criterion, the dockets show that Mr. Webster entered immediately upon a very respectable business.

It then required two years' practice before an attorney could be admitted as a counsellor in the Superior Court, and it was rare that younger mem-

bers of the profession ventured the full flight of an argument to the jury in the Common Pleas, until they had fledged their wings by an opening statement or two as junior counsel.

To this practice, as might be expected, Mr. Webster was an exception; but he came within the ordinary rule, that a lawyer commences his professional life with cases the magnitude of which is somewhat in proportion to his professional experience. It may encourage the young practitioner, whose hopes of some great case in which he may distinguish himself are not immediately realized, to reflect that Mr. Webster's first argument was in the humble capacity of counsel before a justice of the peace. The aspirant may not find so distinguished a magistrate as "George Jackman, Esq., who had held a commission from the time of George the Second." But the jurisdiction of the tribunal may be as ample, and the judgment as important to the interests of his client.

According to the ordinary course of the business at the first term of the Court of Common Pleas that he attended as an attorney (September term, 1805), Mr. Webster's first argument before a jury must have been in an action founded upon a tavern bill, amounting to about twenty-four dollars, in which he succeeded in obtaining a verdict for seventeen dollars. He had the good sense not to despise small things.

He appears at the same term to have conducted the defence in an action of assumpsit, in which a verdict for an amount a little larger was rendered against his client.

There is nothing in the nature of the cases to indicate that either of them admitted of any great display of legal talent. It seems, however, that reference is made to one of these, when it is said that "his father lived long enough to hear his first argument in court, and to be gratified with confident predictions of his future success." But there is evidence of his early professional ability, as manifested at the September term, 1806, when his argument made such an impression upon a friend of the speaker,\* then a lad of some ten or twelve years, that after the lapse of nearly half a century he distinctly remembers the high encomiums passed upon it. "I recollect," he writes, "with perfect distinctness, the sensation which the speech produced upon the multitude. There was a great throng there, and they were loud in his praise. As soon as the adjournment took place, the lawyers dropped into my father's office, and there the whole bearing of the young man underwent a discussion. It was agreed on all hands that he had made an extraordinary effort, when — —, by way of accounting for it, said, 'Ah, Webster has been studying in Boston,

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\* B. F. French, Esq., of Lowell.



and has got a knack of talking; but let him take it rough and tumble awhile here in the bush, and we shall see whether he will do so much better than other folks.' ”

No man ever rose more rapidly to professional distinction by his unaided efforts. It is stated in the *Life of Chief Justice Smith*, that in 1806, before Mr. Webster had been admitted as a counsellor in the Superior Court (and of course before he was entitled to address the jury), being engaged as attorney in a cause of no great pecuniary importance, but of some interest and some intricacy, he was “allowed to examine the witnesses, and briefly to state his case, both upon the law and the facts. Having done this, he handed his brief to Mr. Wilson, the senior counsel, for the full argument of the matter. But the Chief Justice had noticed him, and on leaving the courthouse said to a member of the bar, that he had never before met such a young man as that.” \*

Most of those who, then in mature life, witnessed his early career as a lawyer, have passed away. But those among his juniors who had the means of observation bear uniform testimony to his immediate success. It was and still is a common occurrence in country practice, that counsel other than the prosecuting officer of the government are employed by the party more immediately aggrieved to originate

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\* *Life of Judge Smith*, p. 180.

criminal prosecutions, and to prepare the evidence for the trial. One member of the bar recollects a case of that description in Mr. Webster's early practice, where the preparation of the case insured the conviction of the offender, who, if extraordinary sagacity had not been brought to the aid of justice, would probably have escaped. The merits of the preparation attracted the notice of the Chief Justice, and elicited, along with a strong expression of approbation, confident anticipations of his future success.

Another recalls his argument upon a question of partnership in an adventure to the West Indies, of which men spoke in such terms of commendation as men do not speak of the ordinary arguments in a court of justice; and another believes the removal of Mr. Webster from the County of Hillsborough to the wider and better field of business in the County of Rockingham, at the end of two years from his admission, to have taken place, not merely because his brother had then been admitted to practice, and could well take his office in Boscawen, or because that was his original intention, but for the reason that, having an engagement to argue a cause in the latter county, which then adjoined Hillsborough, he was, at the close of that argument, forthwith retained in nearly all the remaining cases upon the docket standing for trial at that time.

He himself said that there happened to be an

unfilled place among the leading counsel at that bar, and that he succeeded to it, although he did not fill it. Others have no doubt that he filled it; but it seems apparent from their statements, and from his own, that it was through a somewhat severe experience in the outset. The acknowledged leader of the bar in that county then and long after was Jeremiah Mason, and I have only to name him to satisfy most of you, that, whatever might have been Mr. Webster's success thus far, it would hardly have furnished conclusive evidence that he was yet qualified to cope with so formidable an adversary.

Thoroughly versed in the principles and practice of his profession, cool, wary, and persuasive, a sound logician, and of excellent judgment,—devoted to the cause of his client, and willing to avail himself of all technicalities in order to secure his success,—it doubtless required all the science of special pleading which Mr. Webster had acquired in reading and translating Saunders, and all the law which he had derived from other books, to maintain his position.

Some half-dozen years since, in a company of gentlemen, Mr. Webster was applied to for his opinion of Mr. Mason's ability as a lawyer. Speaking deliberately, and in a manner denoting his intention to give emphasis to what he uttered, he replied that he had known, as a young man knows his superiors in age, the bar of a former generation,—all the

leading men in it, — and he was intimately acquainted with all the leading lawyers of the present bar of the United States; but for himself, he had rather meet, if it could be combined, all the talent and learning of the past and present bar of the United States than Jeremiah Mason, single-handed and alone. The man who had Jeremiah Mason for his counsel was sure of having his case tried as well as it was possible for human ingenuity and learning to try it.\* Perhaps there were some reminiscences connected with this declaration.

In a beautiful tribute to the character of Mr. Mason, at a bar meeting upon the occasion of his death, Mr. Webster said: "I am bound to say, that of my own professional discipline and attainments, whatever they may be, I owe much to that close attention to the discharge of my duties which I was compelled to pay for nine successive years, from day to day, by Mr. Mason's efforts and arguments at the same bar. *Fas est ab hoste doceri*; and I must have been unintelligent indeed not to have learned something from the constant displays of that power which I had so much occasion to see and to feel."

It would appear, however, that there were "blows to take, as well as blows to give," from the time of the earliest meeting of Mr. Mason and Mr. Webster as opposing counsel. In another note to the Life

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\* P. Harvey, Esq.

of Chief Justice Smith it is stated, apparently on the authority of Mr. Mason himself, that the first time they met was in a criminal trial. The defendant was indicted for counterfeiting. Mr. Mason was in the defence, and Mr. Webster, in the absence of the Attorney-General, was applied to by the Solicitor for the county to act in behalf of the State. Mr. Mason, it is said, had heard of him as a "young man of remarkable promise"; but he had heard such things of young men before, and prepared himself as he would have done to meet the Attorney-General. But he soon found that he had quite a different person to deal with. The young man came down upon him "like a thunder-shower," and Mr. Mason's client got off, as he thought, more on account of the political feelings of the jury, than from the arguments of the counsel. Mr. Mason was particularly struck with the high, open, and manly ground taken by Mr. Webster, who, instead of availing himself of any technical advantage, or pushing the prisoner hard, confined himself to the main points of law and fact. Mr. Mason did not know how much allowance ought to be made for his being taken so by surprise; but it seemed to him that he had never since known Mr. Webster to show greater legal ability in an argument.\*

It may be added, that the defendant in that case

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\* Life of Judge Smith, p. 263.

had been a member of the Legislature of New Hampshire, and a remark of Mr. Webster, in his argument to the jury, in connection with the statement that the standing of a man did not exempt him from the operation of the law, that "the majesty and impartiality of the law were such that it would bring even its guilty creator to its feet," was adduced to me a few days since, as an instance of his power and felicity of expression even at that day.

I pass over his professional life during his residence in Rockingham. It was one of constant employment. He argued more cases, it is said, than any other member of the bar; but most of them were not of a character to live in history. Instances are related of his sagacity and success there, but a single anecdote must suffice at this time. The case grew out of the common transaction of a conveyance of a farm by a gentleman somewhat advanced in years, with a life-lease or a bond taken back to secure the payment of an annual sum, or rent, for the support of the old gentleman. The sum was duly paid for two or three years, and a receipt of the amount indorsed upon the instrument, and signed by the holder. Next came a failure to pay, and to an application for payment the answer was, that the whole matter was settled, and discharged, the last year. Upon an examination of the instrument, it was found

that the last indorsement, instead of being for the annual payment, purported to be a full discharge.

There was great sympathy for the party thus defrauded, and Mr. Webster was engaged, and an action was commenced, in the hope that the fraud might be shown. Before the trial, however, it was understood that the defendant did not rely upon the written discharge alone, but that he had a witness to prove the fact of the settlement.

The case looked very hopeless unless something should be discovered ; but it proceeded to trial. After it was opened, a friend of the plaintiff stated to Mr. Webster, that there was a person sitting back of the bar, who appeared to be very busy studying a paper which was in his hat. He noted him, and soon after saw him take the stand as *the* witness. He related, in a plausible story, how he was present and heard the terms of the settlement ; but Mr. Webster observed that the language of his testimony was somewhat in legal form, — “the *said*” plaintiff, “the *said*” defendant, &c., — and saw the corner of a paper which was in his vest pocket. When it came to the cross-examination, Mr. Webster rose, and, reaching over the table, snatched the paper from his pocket, with the stern inquiry, “Where did you get that, Sir ?” It proved to be the story drawn up for the witness to relate, and it was apparent that it came from the defendant. The

fraud was made clear, and the action forthwith settled. Men took him for a magician.\*

Some years since, "Mr. Webster, in speaking of the practice of the law in Boston, when he first went there, compared with that in New Hampshire, said he had practised law, commencing before old Justice Jackman in Boscawen, who received his commission from George the Second, all the way up to the court of John Marshall, in Washington, and he had never found any place where the law was administered with so much precision and exactness as in the County of Rockingham." Special pleading had not then been shorn of its honors by brief statements and informal answers.

His removal to Massachusetts took place in 1816, and shortly after his settlement in Boston he was employed in the defence of the Kennistons, indicted for the robbery of Goodridge. Such an account of that trial as can be had at the present day, is found in his Works. I am informed by the junior counsel,† that he maintained the defence quite as much by his dexterity in eliciting the truth on the cross-examination of the witnesses, as by his argument.

A full practice followed very soon after he established himself in Boston.

Among his cases in the State courts, the case of

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\* Professor Greenleaf.

† Hon. S. W. Marston.



the Knapps stands out in bold relief, and is probably familiar to most, if not all, of you.

We must pass over his practice in the State, and turn back some few years, to his entrance into the Supreme Court of the United States.

His election as a member of Congress from New Hampshire, in 1813, led him into that court.

His first appearance there, as chronicled in the Reports, was at February term, 1814.

In 1815 he argued, as senior counsel, *The Town of Pawlet vs. Clarke*. The case involved questions respecting the jurisdiction of the Court of the United States, the construction of the grant of the township by the Provincial Governor of New Hampshire, and the principles of law applicable to one of the shares, declared to be for a glebe for the Church of England; — whether there was a party competent to take this share, under the grant, and the operation of the statutes of Vermont upon cases of that class.

In February, 1817, after his removal to Boston, he seems to have commenced his regular attendance in that court, but the cases at that time were of no great value as contributions to jurisprudence, and while they were sufficient to make him known as belonging to the profession, had no material in them to establish a reputation.

In the succeeding year he appeared as counsel for Bevens, indicted for murder on board the United

States ship Independence, lying in the harbor of Boston; Bevans being a marine and posted as a sentry at the time, and Leinstrum, the deceased, being cook's mate on board the same ship. Questions were reserved whether the offence was committed within the jurisdiction of the State of Massachusetts, or any court thereof, and whether it was within the jurisdiction of the Circuit Court of the United States, and after a verdict against the prisoner, these questions were certified to the Supreme Court for determination. In this case Mr. Webster made a very elaborate argument, involving the consideration of the law of nations relating to ports, the rules of the common law, the jurisdiction in admiralty, and the provisions of the English statutes upon the subject, with the construction of the Constitution and the statutes of the United States respecting the jurisdiction of the Federal courts. This argument might well have given him a character as a lawyer, but from the limited practical results involved in the case, and from subsequent efforts exhibiting greater power and embracing questions of wider interest, it seems to have been lost sight of.

At the same term he argued, with Mr. Hopkinson as his senior counsel, the celebrated case of Dartmouth College, which, from its important bearing upon the rights of corporations, as well as from the signal ability which he displayed in discussing it, has become so widely known.

It is supposed by many to have been his first appearance in the court, and some entertain the belief that he was before unknown at Washington, and that the court was taken by surprise. But a reference to the Biographical Memoir prefixed to his Works, will show that the surprise was on the occasion of his maiden speech in the House of Representatives, in June, 1813, upon certain resolutions of inquiry which he had moved relative to the repeal of the Berlin and Milan decrees. "It was marked by all the characteristics of Mr. Webster's maturest parliamentary efforts, — moderation of tone, precision of statement, force of reasoning, absence of ambitious rhetoric and high-flown language, occasional bursts of true eloquence, and pervading the whole a genuine and fervid patriotism."\* Chief Justice Marshall, writing to Mr. Justice Story, some time after, says, "At the time when this speech was delivered, I did not know Mr. Webster, but I was so much struck with it, that I did not hesitate then to state, that Mr. Webster was a very able man, and would become one of the first statesmen in America, and perhaps the very first." The argument in the case of the Dartmouth College is generally referred to as establishing his fame as a lawyer, and sometimes as if the leading principle of the case — namely, that a grant of cor-

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\* Memoir by Hon. Edward Everett, Webster's Works, Vol. I. p. xxxviii.

porate powers is a contract, within the meaning of the clause of the Constitution of the United States prohibiting the States to pass laws impairing the obligation of contracts — had its origin with him, and was first heard of in the argument of the case at Washington.

On the other hand, it has been said, in a pamphlet purporting to be a sermon, that “it is easy to see that the facts, the law, the precedents, the ideas, and the conclusions of that argument had almost all of them been presented by Messrs. Mason and Smith in the previous trial of the case.”

That case may well be regarded as extending, perhaps as establishing, his fame as an able and eloquent advocate. It was an argument of great power, evincing an intimate knowledge of his subject, a familiarity with the authorities relating to the power of the crown in respect of corporations, — a branch of legal learning which was doubtless at that day much less familiar to the profession in general than it is at present. It contained also an elaborate exposition of the clause in the Constitution of the United States prohibiting the States from passing laws impairing the obligation of contracts, and doubtless had great weight in leading to a construction which gave a broader scope to that clause than most jurists had before supposed it to possess.

All this was enforced by a calm, clear logic, and

at times by pathos and eloquence such as are rarely witnessed in the arguments of mere legal questions.\* There can be no doubt of the great merit of the argument, and any admiration of it as a clear, logical, cogent application of legal principles to the facts of the case, can hardly be deemed excessive.

It may be doubted, however, whether, upon examination, it would be found to be wise, or even just to others, that the whole credit of the successful defence, in that case, should be ascribed to him. President Brown, although not a lawyer, was a very learned man. In the Board of Trustees there were several distinguished men; among them were Judge Paine and Mr. Marsh of Vermont, Judge Farrar and Mr. Thompson of New Hampshire. Judge Smith and Mr. Mason were of counsel, and twice argued the case in the State court,—Mr. Webster being present the last time, and making the closing argument as the senior counsel. The point upon which the case finally turned in the Supreme Court was argued by both of them, but not so exclusively as before the Supreme Court, because in the State court other questions were considered, which Mr. Webster regretted were not open for discussion in the tribunal of last resort. It is hardly probable, under these circumstances, that the credit of the

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\* Mr. Ticknor, in the *American Review*. See Webster's Works, Vol. I. p. li.

defence, even upon the point upon which it prevailed, should belong exclusively to any individual. However early in the case Mr. Webster may have been of counsel, I am not aware that there is any evidence to show that he originated the idea that the charter was a contract protected by the Constitution of the United States. It was used by the other counsel who argued before him as a part of the common stock of the defence, and if they never claimed a sole property in it, I am not aware that they ever disclaimed any right to it, as they would probably have done if conscious that it belonged exclusively to one for whom they both entertained so high a regard.

But that he was not entitled to his full share — to the lion's part even — of the credit belonging to that defence, has been suggested nowhere, I think, except in the quarter to which I have referred. If proof were required to show that he was not repeating the other counsel, it might be found in the declaration made by one of them to the other, as they were leaving the court-room, after the last argument in the State court. "There, it is as I told you it would be, that Webster would show himself a head taller than either of us." And in a contemporaneous article in the *Salem Gazette*, which, as it assumes to give the distinctive features of the arguments on the part of the plaintiff, may be of sufficient interest to be repeated, it is said: "Mr. Mason

opened the cause on Friday morning, and, in a speech of about two hours, presented to the court a most clear, comprehensive, and masterly argument, distinguished for great force and acuteness of reasoning, and for the beauty of its illustrations. He was followed by Judge Smith, who spoke about four hours, and brought forth all the learning of the books to enforce the principles laid down by his colleague, and produced a very elaborate, ingenious, and interesting argument, enlivened by much classic point, and delicate wit and humor. On Saturday morning Messrs. Bartlett and Sullivan took up about three hours in behalf of the University" (the defendant), "and displayed much ability and ingenuity. Mr. Webster replied to them with great force and effect, in a speech of little more than an hour. Though upon a mere question of law, and strictly confining himself to the subject, yet by the genius and eloquence — eloquence of soul, of sublime sentiment and feeling — with which he presented his views of the cause, he swelled the hearts and filled the eyes of many who listened to him with delight."

Whether his argument in the case of Dartmouth College led to his engagement in the case of *McCulloch vs. The State of Maryland*, which was argued at the next term, and stands in the reports before the other, the opinion having been pronounced earlier, I am unable to say. It embraced questions of great

magnitude respecting the United States Bank, — its constitutionality, its right to establish branches in the several States, and the right of the States to tax those branches. He was associated with Mr. Wirt, the Attorney-General of the United States, and Mr. Pinkney; and opposed to Mr. Hopkinson, Mr. Jones, and Mr. Luther Martin, the Attorney-General of the State. A note informs us that, “this case involving a constitutional question of great public importance, and the sovereign rights of the United States and the State of Maryland, and the government of the United States having directed their Attorney-General to appear for the plaintiff in error, the court dispensed with its general rule permitting only two counsel to argue for each party.”\* All were heard, and it certainly was a distinguished post to be even junior counsel in such a case, and in such company.

If I were obliged, however, to rely upon any one argument in a court of justice on which to rest Mr. Webster's reputation as a distinguished constitutional lawyer, it would be that in *Gibbons vs. Ogden*, decided in 1824.†

Most of you are aware that this case grew out of the grants of the State of New York, first to Fitch and subsequently to Fulton, of certain exclusive rights to navigate the waters of that State with fire

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\* 4 Wheaton's Reports, 322.

† 9 Wheaton's Reports, 1.



and steam as the motive power, and acts to secure the benefit of those grants to Fulton and his assignees. The assertion of the exclusive right gave rise to great excitement, and to counter legislation on the part of the States of New Jersey and Connecticut. Ogden was interested under the grant. Gibbons, having obtained a coasting license for certain steamboats belonging to him, asserted a right under that license to navigate the waters of the Sound from New Jersey to New York, and Ogden filed a bill in the Court of Chancery in New York for the purpose of obtaining an injunction to restrain him. The defence was placed upon two grounds: 1. That the grants of the exclusive privileges by the State of New York were void so far as they attempted to restrain navigation authorized by the Constitution and laws of the United States, and that the defendant, having a license to employ his vessel in the coasting trade, had a right to pass from point to point, notwithstanding the grant and the restraining acts; and, 2. A license from Ogden himself. The latter was not sustained. Chancellor Kent evidently considered that there was weight in the first objection, although he was not convinced that the case was clear enough for him to decide against the grant. The closing paragraph of his opinion upon this point is remarkable, not merely as implying some doubt of the right of the State to make the

grant, but for the felicitous manner in which he concludes his opinion, that nothing but the judgment of the superior tribunal of that government which had the power to regulate commerce, would warrant a decision adverse to the State legislation. "If," said he,\* "the State laws were not absolutely void from the beginning, they require a greater power than a simple coasting license to disarm them. We must be permitted to require the presence and clear manifestation of some constitutional law, or some judicial decision of the supreme power of the Union, acting upon those laws, in direct collision and conflict, before we can retire from the support and defence of them. We must be satisfied that,

*'Neptunus muros, magnoque emota tridenti,  
Fundamenta quatit.'*"

The case was carried to the Court of Errors, and, what is again somewhat remarkable, the judgment of that court affirming the decree of the Chancellor was unanimous.† The defendant removed the case to the Supreme Court of the United States by a writ of error, and Mr. Wirt and Mr. Webster were engaged as counsel.

It is not, I think, generally known, but it is stated that, "when they met for a consultation respecting the case at the time of the hearing, Mr.

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\* 4 Johnson's Chancery Reports, 159.

† 17 Johnson's Reports, 488.

Wirt, who was senior counsel, asked Mr. Webster what position he proposed to take, and that he then gave him his views of the case, and the ground to be taken. Mr. Wirt, in answer, said that he did not think the case could be made to stand upon his positions, and that he thought a certain other view, which he gave, was the true line of argument. To this Mr. Webster as fully and frankly dissented, as Mr. Wirt had just before done to his positions. It was thereupon agreed that each should go into the court upon his own views of the case." \* There is, in the argument as reported, evidence to sustain this account of the consultation. Mr. Wirt urged, as the main point in his argument, that the legislation of New York was in conflict with the provisions of the Constitution of the United States giving to Congress the power to promote the progress of science and the useful arts. Mr. Webster did not rely upon this, nor mainly upon the coasting license under the act of Congress, but assumed the broader ground, that the grant of power to regulate commerce was exclusive in the United States; that commerce was a *unit*, and that the grants and statutes of New York on the subject were regulations of commerce, and thus directly in conflict with the Constitution.

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\* For this anecdote I am indebted to Judge Crosby of Lowell. The authority is Peter Harvey, Esq.

The remarks of Judge Wayne, in an address to Mr. Webster upon the occasion of his visiting Savannah in 1847, give him the credit of originating and sustaining this construction. Speaking of the position that a coasting license gave a right to navigate, he said, "It was a sound view of the law, but not broad enough for the occasion. It is not unlikely that the case would have been decided upon it, if you had not insisted that it should be put upon the broader constitutional ground of commerce and navigation."

And in his reply, Mr. Webster said, "It is true that, in the case of *Gibbons vs. Ogden*, I declined to argue this cause on any other ground than that of the great commercial question presented by it, — the then novel question of the constitutional authority of Congress *exclusively* to regulate commerce in all its forms, on all the navigable waters of the United States, their bays, rivers, and harbors, without any monopoly, restraint, or interference created by State legislation." \*

This construction of the Constitution, so important in its result, was, so far as I am aware, first suggested upon that argument.

It is further said, on the authority before referred to, that, "Mr. Webster having stated his positions to the court, Judge Marshall laid down his pen, turned

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\* Works, Vol. II. p. 402.

up his coat-cuffs, dropped back upon his chair, and looked sharply upon him; that Mr. Webster continued to state his propositions in varied terms, until he saw his eyes sparkle and his doubts giving way; that he then gave full scope to his argument, and that he never felt the occasion of putting forth his powers as when he was arguing a question before Judge Marshall. Mr. Wirt followed, but Judge Marshall gave much of Mr. Webster's language and argument in his decision, with no more than a reference to Mr. Wirt's."

Although the decision was finally made upon the right of the defendant under his coasting license, and the invalidity of the grants of exclusive rights as against the constitutional provision and the statutes under which the license was granted, the opinion of the Chief Justice follows and sustains very distinctly the argument of Mr. Webster upon the construction of the Constitution, the invalidity of the prohibitory laws of New York as regulations of commerce, and the right of the defendant to navigate the waters of New York independent of the license.

The case of the appellant being sustained under the constitutional provision respecting commerce, it did not become necessary to examine that in relation to science and the arts, and the Chief Justice so stated.

It would extend this sketch beyond its prescribed

limits, were I to give even brief notices of the most important cases in which he was subsequently engaged as counsel.

The reports of Mr. Webster's legal arguments are in most instances mere skeletons of the body, into which he breathed the breath of life and made it a warm and vigorous creation; while his orations, and many of his speeches, of which notes were taken at the time with a view to an extended report, are published in the words, or very nearly the words, which came from his lips.

But the arguments will endure, and the student of the law will resort to them, not only for their value as expositions of legal principles, but to some extent as precedents by which to fashion his own course of reasoning.

The divine will cite his arguments and his speeches, as well as his orations, for the support which they give to good order, morality, and religion. All his efforts as a jurist claim that commendation. In this respect, however, he was not an exception to the rule. Whatever may be private dereliction, followed by private repentance, to the credit of the bar be it said, that the instance is exceedingly rare, if it be known, in which any member of the profession, while in the course of the public duties of it, does not recognize the overruling providence of the Deity, and the duty, founded upon His law, of justice and

equity between man and man. If he may be required, at times, to insist that the rules of the law applicable to the case before the court furnish for human tribunals the equity and justice which must govern that case, and that all beyond must be left to the personal conscience of the parties; the conscientious lawyer, in a state of facts which tend to impeach the justice of the dealings of his client, does not attempt to shield him by a weakening of the bonds of moral obligation or an undermining of religious faith.

But in the frequency of his recognition of moral duties and religious obligation, in the course of his forensic employment, he stands preëminent, and the beauty and energy of that support have given it a value beyond the occasions in which it was elicited.

Reference is often made to his description, upon the trial of Knapp, of the constant presence to the mind of a sense of duty, — of the cheering influence of duty performed, and the haunting recollection of duty neglected.

His remarks to the Ladies of Richmond inculcate with great force the sentiment, that moral obligations attend all our actions: — “I have already expressed the opinion, which all allow to be correct, that our security for the duration of the free institutions which bless our country depends upon habits of virtue and the prevalence of knowledge and of education. The

attainment of knowledge does not comprise all which is contained in the larger term of education. The feelings are to be disciplined ; the passions are to be restrained ; true and worthy motives are to be inspired ; a profound religious feeling is to be instilled, and pure morality inculcated, under all circumstances. All this is comprised in education. Mothers who are faithful to this great duty will tell their children, that neither in political nor in any other concerns of life can man ever withdraw himself from the perpetual obligations of conscience and of duty ; that in every act, whether public or private, he incurs a just responsibility ; and that in no condition is he warranted in trifling with important rights and obligations. They will impress upon their children the truth, that the exercise of the elective franchise is a social duty, of as solemn a nature as man can be called to perform ; that a man may not innocently trifle with his vote ; that every free elector is a trustee, as well, for others as himself ; and that every man and every measure he supports has an important bearing on the interests of others, as well as on his own. It is in the inculcation of high and pure morals such as these, that in a free republic woman performs her sacred duty and fulfils her destiny." \*

His argument in the case of Girard's will, against

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\* Works, Vol. II. p. 107.



any system of education which excludes religion as its basis, will stand as a testimonial in favor of Christianity quite as convincing as the most eloquent sermon. "Christianity," said he, "is part of the law of the land. Every thing declares it. The massive cathedral of the Catholic; the Episcopalian church, with its lofty spire pointing heavenward; the plain temple of the Quaker; the log church of the hardy pioneer of the wilderness; the mementos and memorials around and about us; the consecrated graveyards, their tombstones and epitaphs, their silent vaults, their mouldering contents; all attest it. *The dead prove it as well as the living.* The generations that are gone before speak to it, and pronounce it from the tomb. We feel it. All, all proclaim that Christianity, general, tolerant Christianity, Christianity independent of sects and parties, that Christianity to which the sword and the fagot are unknown, general, tolerant Christianity, is the law of the land." \*

The scholar will resort to those of his works of which finished reports exist, to acquire a more clear and lucid mode of statement and of deduction. They are models of a strong, nervous, direct, and elevated style, altogether exempt from bombast or bathos, inflation or turgidity, as well as from feebleness, and uncertainty, and involution.

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\* Works, Vol. VI. p. 176.

And the orator will moreover seek in them for examples of eloquence, and felicity of classical allusion and illustration.

The student should make himself familiar, not alone with his legal arguments, but with his orations and speeches, for the value of the rhetoric; for the eloquence of statement, as well as of the sentiments. He should study the graphic manner in which he presents before his auditor and his reader the events and scenes which he describes, and feel how completely his words must have identified his hearer with himself.

We are with him at the celebration of the landing of the Pilgrims: — "*We* have presented before us the principal features and the leading characters in the original scene. *We* cast our eyes abroad on the ocean, and we see where the little bark, with the interesting group upon its deck, made its slow progress to the shore. We look around us and behold the hills and promontories where the anxious eyes of our fathers first saw the places of habitation and of rest. We feel the cold which benumbed, and listen to the winds which pierced them. Beneath us is the rock on which New England received the feet of the Pilgrims. We seem even to behold them as they struggle with the elements, and with toilsome efforts gain the shore. We listen to the chiefs in council, we see the unexampled exhibition of female fortitude

and resignation, we hear the whisperings of youthful impatience, and we see what a painter of our own has also represented by his pencil; chilled and shivering childhood, houseless but for a mother's arms, couchless but for a mother's breast, till our own blood almost freezes." \*

We stand by his side at the laying of the cornerstone of the Monument on Bunker Hill: — "*We* come, as Americans, to mark a spot which must for ever be dear to us and our posterity." And we unite in the wishes which he expresses as the organ of the association for its erection: — "*We* wish that whosoever, in all coming time, shall turn his eye thither, may behold that the place is not undistinguished where the first great battle of the Revolution was fought. We wish that this structure may proclaim the magnitude and importance of that event to every class and every age. We wish that infancy may learn the purpose of its erection from maternal lips, and that weary and withered age may behold it, and be solaced by the recollections which it suggests. We wish that labor may look up here and be proud in the midst of its toil. We wish that in those days of disaster, which, as they come upon all nations, must be expected to come upon us also, desponding patriotism may turn its eyes hitherward, and be assured that the foundations of our national

power are still strong. We wish that this column, rising towards heaven among the pointed spires of so many temples dedicated to God, may contribute also to produce, in all minds, a pious feeling of dependence and gratitude. We wish, finally, that the last object to the sight of him who leaves his native shore, and the first to gladden his who revisits it, may be something which shall remind him of the liberty and the glory of his country." And we exclaim with the orator, "Let it rise! let it rise, till it meet the sun in his coming; let the earliest light of the morning gild it, and parting day linger and play on its summit." \*

In the power of clothing his conceptions in appropriate costume, and presenting them in beautiful imagery, he stands among the most distinguished. Witness his reference to the testimony of the agonized father of Knapp:—"He thinks, or seems to think, that his son came in at about five minutes past ten. He fancies that he remembers his conversation; he thinks he spoke of bolting the door; he thinks he asked the time of night; he seems to remember his then going to bed. Alas! these are but the swimming fancies of an agitated and distressed mind. Alas! they are but the dreams of hope, its uncertain light, flickering on the thick darkness of parental distress." †

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\* Works, Vol. I. p. 62.

† Ibid., Vol. VI. p. 84.

Witness his tribute to the services of Hamilton : — “ He was made Secretary of the Treasury ; and how he fulfilled the duties of such a place, at such a time, the whole country perceived with delight, and the whole world saw with admiration. He smote the rock of the national resources, and abundant streams of revenue gushed forth. He touched the dead corpse of the public credit, and it sprang upon its feet. The fabled birth of Minerva from the brain of Jove was hardly more sudden or more perfect, than the financial system of the United States, as it burst forth from the conceptions of Alexander Hamilton.” \*

Witness his description of the power and influence attached to the name of Washington, and his statement of the importance of the political example of the United States : —

“ We are met to testify our regard for him whose name is intimately blended with whatever belongs most essentially to the prosperity, the liberty, the free institutions, and the renown of our country. That name was of power to rally a nation, in the hour of thick-thronging public disasters and calamities ; that name shone, amid the storm of war, a beacon light, to cheer and guide the country’s friends ; it flamed, too, like a meteor, to repel her foes. That name, in the days of peace, was a loadstone, attract-

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\* Works, Vol. I. p. 200.

ing to itself a whole people's confidence, a whole people's love, and the whole world's respect. That name, descending with all time, spreading over the whole earth, and uttered in all the languages belonging to the tribes and races of men, will for ever be pronounced with affectionate gratitude by every one in whose breast there shall arise an aspiration for human rights and human liberty."

"Gentlemen, the spirit of human liberty and of free government, nurtured and grown into strength and beauty in America, has stretched its course into the midst of the nations. Like an emanation from heaven it has gone forth, and it will not return void. It must change, it is fast changing, the face of the earth. Our great, our high duty, is to show, in our own example, that this spirit is a spirit of health as well as a spirit of power; that its benignity is as great as its strength; that its efficiency to secure individual rights, social relations, and moral order, is equal to the irresistible force with which it prostrates principalities and powers. The world at this moment is regarding us with a willing, but something of a fearful admiration. Its deep and awful anxiety is to learn whether free states may be stable, as well as free; whether popular power may be trusted, as well as feared, in short, whether wise, regular, and virtuous self-government is a vision for the contemplation of theorists, or a truth established, illustrated,

and brought into practice in the country of Washington.

“Gentlemen, for the earth which we inhabit, and the whole circle of the sun, for all the unborn races of mankind, we seem to hold in our hands, for their weal or woe, the fate of this experiment. If we fail, who shall venture the repetition? If our example shall prove to be one, not of encouragement, but of terror, not fit to be imitated, but fit only to be shunned, where else shall the world look for free models? If this great *Western Sun* be struck out of the firmament, at what other fountain shall the lamp of liberty hereafter be lighted? What other orb shall emit a ray to glimmer, even, on the darkness of the world?”\*

As an example of his felicity of classical quotation and illustration, I shall refer you to but a single instance, — the close of his argument in the case of Dartmouth College. The case had been heard in the highest court of the State, and judgment there was against the plaintiff. From that judgment there was no appeal, and no escape, but by a writ of error to the Supreme Court of the United States, and that upon the position that the acts of the Legislature were in conflict with the Constitution. The reasons for this position had been arrayed and urged upon the attention of the court with great cogency, but

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\* Works, Vol. I. pp. 219, 224.

the advocate, as a last appeal, commends them to the consideration of the court of last resort because it is such. "*Omnia alia perfugia bonorum, subsidia, consilia, auxilia, jura ceciderunt. Quem enim alium apellem? quem obtester? quem implorem. Nisi hoc loco, nisi apud vos, nisi per vos, judices, salutem nostram, quæ spe exigua extremaque pendet, tenuerimus, nihil est præterea quo confugere possimus.*" \*

But his most distinguishing characteristics, whether as a jurist, a legislator, an orator, or a writer, were his full comprehension of his subject, and the perspicuity and strength with which he presented his views of it.

His conceptions were clear and vivid, and his comprehension great.

In his ability to keep his whole case present to his mind and to follow out his train of reasoning, constantly keeping the end distinctly in view, and steadily approaching it, making each portion of his argument in due order successively subservient to the purpose to be accomplished, he is not exceeded, I think, by any.

Although his imagination was in full proportion with his other faculties, it rarely led him into any digression which diverted the attention of his hearer from the main object, and from which he must return

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\* 4 Wheaton's Reports, 600 ; Works, Vol. V. p. 501.



to resume his discourse again at the point of divergence.

If compelled to digress by any extraneous circumstances, he was at no loss respecting the place of departure, nor for the means of regaining the course in which he was proceeding.

The strength and force with which he presented his subject were in proportion and in harmony with his grasp of it. Great powers of analysis, or generalization, or condensation, as the occasion might require, were called into action at will.

His statement of his case was so perspicuous, that it has been said, in some instances, that when the statement was made, the case was argued.

His illustrations were appropriate, never causing the hearers to wonder how they happened to be introduced, or what relation they could bear to the subject.

The logic of his argument was transparent. His hearers understood him without effort, unless the effort were required from the abstruse character of the subject. On a subject of interest to them, their attention was enchained, and they were carried along with him; but there was no sense of weariness from efforts to comprehend the course and the effect of the reasoning.

In the argument of a question of fact to a jury, he sought to convince them by a classification and

sifting of the testimony, by an ascertainment of a state of facts favorable to his client, by arranging them in connection with the principles of the law in such a perspicuous statement and course of reasoning as would carry the hearer by a series of deductions which must be admitted, because shown, step by step, to the final result. And so far as conviction was to be carried to the mind, and a favorable result attained by such a process, he stood certainly among the eminent, if not preëminent.

To success in such a course of argument, it is necessary, not only that the speaker should have in the outset the whole case and all its bearings in his mind, and that all this should remain present to him, so that he can perceive, not only the immediate effect and operation of each proposition which he endeavors to maintain, but the remote bearing even of all the remarks he may make; otherwise, by the attempt to maintain an untenable position, he gives an opportunity to his adversary to demolish one of his chain of posts, causing the fall of those in connection with it and dependent upon it.

Even an incautious, an unadvised remark, may give occasion for a reply, the effect of which is felt much beyond the mere success of controverting the statement contained in it.

There was in Mr. Webster's arguments no wavering as to the course to be pursued, no hesitation

which topic to select next, leading to the adoption of one, and then the abandonment of that and the substitution of another.

His discourse proceeded like the regular flow of a mighty current, generally smooth and placid, as well as powerful, swelling perhaps with greater force if pent within narrower limits, and giving some note of the presence of any obstruction which impedes its course, expanding itself for a moment, fertilizing its banks and giving life to beautiful flowers, but following on, in its regular channel, to its ultimate destination.

That his arguments were admirably adapted to command the assent and compel the belief of his hearers, in a good cause, you need not be told. He almost persuades us that the conscience of the murderer is constantly urging him to confession, and that his perilous secret cannot be retained,—the exception instead of the rule,—and it will readily be believed that his auditors, in a case of such painful interest, should become so excited and absorbed by his course of argument as to experience a sense of physical oppression.

“I heard,” writes a friend,\* “Mr. Webster’s great argument in the trial of Knapp. I sat near him, in full view of his person, where I could watch every motion and emotion, all the rolling and flashing of

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\* Judge Crosby, of Lowell.

the eye, and the changing expression of his beautiful, yet awful face. I never before, nor have I since, felt human power — power of mind and circumstance — equal to it or like it. His voice, his logic, his glowing descriptions, beautiful and terrific by turns, his language, his eloquence, with the ever-varying shades of his countenance, took perfect possession of all my powers and sensibilities. I was carried at his will, and absorbed and lost under his power. When he passed from one topic and branch of his argument to another, I would awake to conscious lassitude and weariness, — a sinking of every muscle in my body, — a sudden relief from high mental and nervous excitement; — it was relief for a moment only, for I was soon again following him towards another point of conviction of the inevitable doom of the offender. The court was a high and honorable, and then awful tribunal, — the criminal was young and gentlemanly, and surrounded by reputable friends, — the bar was filled with lawyers, and the court-house densely crowded with anxious citizens. I doubt whether Mr. Webster was evermore excited, more impressive, or victorious.”

From the fact that the people thronged wherever he was to speak, and that he was listened to with such intense interest, it has been supposed that “neither judge nor jury could often withstand his power

of eloquence," and that it "gave him a success as an advocate at the bar which in this country is without a parallel"; and it might perhaps be inferred from the qualities which I have ascribed to him, that he carried away his auditors at pleasure, and moulded them to his purpose.

But it will hardly excite surprise, after a moment's reflection, when I add that his success with courts and juries was very much dependent upon the goodness of his case, and with politicians according to their previous political opinions.

Your own deductions will readily lead to the conclusion, that when the statement is clear, the defect in the case, if one exist, may be the more apparent; and Mr. Webster met his case fairly. He resorted to no tricks to make the worse appear the better reason. He did not exhibit the same power when his argument was merely the presentation of the case of his client, and his own convictions of the merits of the case did not give life and energy to it. It was said upon the occasion of his decease, by a distinguished counsellor who had been accustomed to practise by his side, that "he could not argue a bad cause comparatively well."\* And in the later period of his life the remark was occasionally heard, that "it required a great case to rouse him to the exertion of his powers." We may not overlook the im-

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\* C. G. Loring, Esq.

port of these words. The student of the law should understand that the most thorough acquisition of the general principles of the science, will not insure the due application of his knowledge to any but the plainest case, without time for reflection, a careful consideration of the facts, and of the bearing of his principles upon them, and a concentration of his energies upon the matter before him. Besides, a limited observation teaches us that it is given to no individual at the present day, in any part of the country where the law is duly administered, to sway the verdicts and judgments of juries and courts at the pleasure of his will.

The success of an orator and an advocate in bringing his auditory to adopt his conclusions is dependent somewhat upon their intelligence and freedom from bias, as well as upon his ability.

If they have in the outset strong opinions of their own, they are not readily reasoned out of them. This is especially true of political opinions, with which, however, we have little to do upon the present occasion.

If they have not the capacity to comprehend the bearing of the discourse, or its reasoning, his hearers will be influenced in their opinions and conclusions mainly by their preconceived notions respecting the speaker, or the subject-matter, or the parties, or possibly by extraneous and accidental circum-

stances. If they have that degree of information which enables them to comprehend what is set directly before their minds, and to admire without reflection or the exercise of judgment, a skilful speaker, having the power of enchaining the attention by a smooth diction, a persuasive style of address, and a deferential manner, and trained to note the impression which he produces, will carry more votes, and command more verdicts, than one who relies upon the force of his logic, and the ability with which he can present the facts of the case. If to these qualities be added a facility of invective, or denunciation of whoever stands in opposition, the orator who addresses himself to these semi-intelligent auditors may be nearly resistless.

It is for such reasons that, in the defence of capital cases, the selection of jurors is generally made with a view to their impressibility, their humanity, and their want of capacity to estimate the force of a connected chain of reasoning. And we often hear of the success of advocates, not from their great legal attainments, or the superiority of their powers of reasoning, but from various other causes; from their ability to follow out a popular course of argument, from a persuasive style of discourse, putting the hearer on good terms with the advocate and himself, from great professions of candor and fairness, and from powers of wit and ridicule.

Among the names of note in England as popular advocates, Erskine perhaps stands preëminent. Sergeant Cockle was quite celebrated; and it is said to have been a common verdict with the jury, "We find for Sergeant Bond, and costs."

If in this country the intelligence of the jurors has given a better shape and form to their verdicts, we have almost within our own time evidence of the remarkable success with which lawyers of popular talents have procured them for their clients, especially in criminal cases.

Mr. Benjamin West, of New Hampshire, was a marked instance of this. And of Mr. Grundy, of Tennessee, it is related, that of numerous capital cases he never lost one, or but one. Mr. Clay's success also is well known.

Let me not be understood as insinuating that the distinguished gentlemen whom I have just named resorted to any of the unworthy arts of the advocate. Far from it. They were undoubtedly great men. But their extraordinary success was due, I think, to the popular character of their talents, and to the degree of education among the jurors of that time. Mr. Webster's greatness was of a different character; and no similar success is to be expected at the present day.

The face of things is all changed. Jurors do not come to their duty from a retirement and seclusion



fitted to make them the subjects of a persuasive oratory. The school has extended its operations. The newspaper and periodical press scatter their sheets broadcast over the land. The increase of population and the course of business have changed the isolated households, each of which provided to a great extent for its own wants by its home manufactures, into communities where each family is more directly dependent upon others for the supply of its daily wants. Trade and intercourse enlarge the conceptions and reflections of a people, and thus serve as a practical education, enabling them the better to comprehend the relations of things.

For these reasons, as well as because his talents were not of a popular order, and because the final charge from the bench is more generally understood to furnish reliable principles of law for the guidance of the jury in the particular case, it was impossible that Mr. Webster should attain to that measure of mere success which has distinguished some others ; and if there were no direct evidence respecting the fact, we should not be prepared to admit the statements, that “ you felt before he opened his lips that all your arguments were giving way, — that it was all over with you, — a foregone conclusion, — that you had nothing to offer why sentence should not even then be pronounced ; you stood hopeless and helpless, — resigned yourself at discretion to be

borne along on the calm but irresistible flow of words whithersoever he would"; that he possessed "a power of eloquence which in the maturity of after life neither judge nor jury could often withstand"; and that he had "a success as an advocate at the bar, which in this country is without a parallel."

There is, if not exaggeration itself, at least a tendency to exaggeration in all enthusiasm. We gain no very definite idea of the dignity of Mr. Webster's appearance, by being told that "he was gazed at as something more than mortal, and having appeared as Moses might when emerging from the smoke of Sinai, his face all radiant with the breath of divinity."

We shall not the better comprehend the magnitude and extent of his powers by exhausting upon them all the superlatives which the vocabulary can furnish.

We shall form a false estimate of his early manhood, if we understand literally the statement, that "before the meridian of his life, he had come to stand, in respect to thorough and various legal learning, at the very head of the American bar, and was widely known through the country as the great lawyer before he was known in any other character." Whether the age of thirty-six be regarded as before or after the meridian of life will depend upon the points which we assume for its commencement and termi-

nation. If we regard it as beginning at the age of majority, it will remove the meridian somewhat from its natural position. It was at the age just mentioned that he argued the case of Dartmouth College, before which, certainly, his professional fame could not have been greatly extended beyond the limits of New England. But years previous to that he had become widely known as a member of the House of Representatives by numerous speeches which attested his ability, and the first of which, as we have seen, gave rise to a prediction by Chief Justice Marshall of his future greatness as a statesman. At that period there was a bright constellation within the bar of the Supreme Court of the United States,—Harper, Martin, Jones, Hopkinson, Ogden, and others.

Mr. Wirt's title to be regarded as a most eminent lawyer was not dependent upon his position as Attorney-General, and it might deserve a question whether it must not have required more than one or two arguments, however learned and brilliant, to place any one, at that period, in advance of him in the public estimation.

At that time, also, Mr. Pinkney was in the zenith of his fame. He died February 25th, 1822. In a memorandum prefixed to the volume of the Reports for that year, introductory to the proceedings of the Court and Bar with reference to that event, it is

said: "For many years he was the acknowledged leader at the head of the bar of his native State, and during the last ten years of his life, the principal period of his attendance in this court, he enjoyed the reputation of having been rarely equalled, and perhaps never excelled, in eloquence and the power of reasoning upon legal subjects." \*

Up to that time, it may be said, Mr. Pinkney was the "defender of the Constitution." In the same memorandum we find, after a high tribute to his learning and arguments: "But it is as an enlightened defender of the national Constitution against the attacks which have been made upon it, under the pretext of asserting the claims of State sovereignty, that his loss is most to be lamented by the public. It is known to his friends, that he was a short time before his death engaged in the investigations preparatory to making a great effort in the Senate upon this interesting subject."

And in this connection it may be noted that Mr. Pinkney, in the closing argument in *McCulloch vs. Maryland*, sets forth in strong terms the proposition that the Constitution of the United States was not a federative league, but was derived from powers communicated directly by the people; — which is the basis of the great constitutional argument in the replies of Mr. Webster to Mr. Hayne and Mr. Cal-

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\* 7 Wheaton's Reports, xv.

houn. Speaking of the question, whether the act of Congress establishing the bank was consistent with the Constitution, he said: "No topics to illustrate it could be drawn from the Confederation; since the present Constitution was as different from that as light from darkness. The former was a mere federative league; an alliance offensive and defensive between the States, such as there had been many examples of in the history of the world. It had no power of coercion but by arms. Its radical vice, and that which the new Constitution was intended to reform, was legislation upon sovereign states in their corporate capacity. But the Constitution acts directly *on* the people, by means of powers communicated directly *from* the people. No State in its corporate capacity ratified it, but it was proposed for adoption to popular conventions. It springs from the people, precisely as the State constitutions spring from the people, and acts on them in a similar manner. It was adopted by them in the geographical sections into which the country was divided. The federal powers are just as sovereign as those of the States." \* It was this argument concerning which Judge Story wrote to a friend: "I never in my whole life heard a greater speech. It was worth a journey from Salem to hear it; his elocution was excessively vehement, but his eloquence was over-

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\* 4 Wheaton's Reports, 377.

whelming. His language, his style, his figures, his arguments, were most brilliant and sparkling. He spoke like a great statesman and patriot, and a sound constitutional lawyer. All the cobwebs of sophistry and metaphysics about State rights and State sovereignty, he brushed away as with a mighty besom." \*

There is doubtless quite as strong a tendency to exaggeration in a partisan opposition as there is in an enthusiastic approbation. I need not pause to cite examples.

But it has been objected to Mr. Webster, that he originated nothing; that is, that his efforts were to sustain the present, rather than provide new rules for the future. It may be true that the tone of his mind was in general conservative, — that he was of opinion that the government we possessed was sufficient for us, if its resources were developed and it was well administered. Except his efforts for the extension of the blessings of civil liberty, he did not stand foremost in the ranks of the reformer.

But the objection, if it be one, has less weight when applied to his character as a jurist than it might have to him as a statesman. A jurist eager to signalize himself by great and immediate radical reforms may be a very dangerous and mischievous animal. I hardly need to say to you, that I am by

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\* Story's Life and Letters, Vol. I. p. 325.

no means unfriendly to reform. But the abolition of one system of law and the introduction of a new and untried code cannot but cause great disturbance and uncertainty. It is partly for this reason that conquest does not of itself impose the laws of the conqueror upon the vanquished country. What would be the effect, in any State, of a statute which should abrogate the common law, and introduce the French code "so far as it could be adapted to a republican form of government," need not require an argument. The rules of law which regulate the relations of life are so interwoven, that a great change cannot be effected in one part without corresponding changes in others, or a disturbance in the harmony of the system.

Besides, the actual duty required of the jurist in Mr. Webster's day was rather that of construction and adaptation, than that of striking out new and untried theories.

It has not been objected to the elder Parsons, that, after aiding in the formation of the Constitution, instead of devising and introducing a new code of laws for the government of Massachusetts, he performed the perhaps greater, and certainly more beneficial labor, of applying the principles of the common law to the new state of things which had arisen in the country, and adjusting the several parts of the new system so as to form a harmonious whole in the

new relations of the several parts ; — a work which was far from being completed when he took his seat upon the bench, and of which he, at the bar and on the bench, performed, at least, his full share.

The term "*learned*" is sometimes used as if it were applicable only to one who had read many books. In one of its uses it undoubtedly bears that construction. Thus it has been said, "Men of much reading are greatly learned, but may be little knowing." In this sense Mr. Webster was not a learned lawyer. The circumstances attending his early professional education did not admit of a deep and thorough study of the jurisprudence of Continental Europe, however much that might have aided him as a practising lawyer in the courts of common law (a problem not yet perhaps satisfactorily solved). And there is, I think, no evidence in any of his arguments, that at a later period he attempted to acquire a little smattering of German jurisprudence, or picked up an occasional excerpt from the *proces verbal* of some French tribunal, with the idea of thereby appearing to be wise beyond his day and generation.

It may be true, that he was not a diligent reader of the books of the law from the period when his labors as a statesman became very arduous and engrossing.

It is clear that he did not make himself an ill-



digested index of well and ill considered propositions and adjudications, using them sometimes luckily, and sometimes unluckily, as it might happen.

He did not need the learning, even of good cases, to the same extent as many others; and investigations of that character could be made for him by junior counsel, as the occasion required.

But so far as deep and earnest study of the principles of the science of the law, in their application to the affairs of government and of men, according to the system in the administration of which he bore his part, and a comprehensive knowledge of those principles, may be understood to make a learned lawyer, he is entitled to that distinction.

In these particulars, I think, he closely resembled Chief Justice Marshall, for whom he had a great regard. That he had great fondness for political life, and was therein dissimilar, is undoubtedly true.

I have it from reliable authority,\* that at one time President Jackson was desirous of showing that he appreciated the support that his administration had received from Mr. Webster's Senatorial labors; and that the venerable Chief Justice was not averse to a resignation which should leave his mantle to fall upon him. But the suggestion met with no favor. The scope of the duties was too limited for his taste at that day.

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\* Hon. J. Mason.

The school of practice in which Mr. Webster's early professional life was passed, in New Hampshire, was one which inculcated great fidelity to the interests of the client, rather than great courtesy towards the opposing counsel. It is somewhat difficult, in the earnest exertions of the forum, to keep, at all times, such watch and ward over the amenities of our intercourse with those around us, as may easily be prescribed within the limits of the social circle; and I should probably not command your ready assent, should I present Mr. Webster to you as the *beau ideal* of professional courtesy. While from any thing I have observed, I should not be warranted in saying that he was at any time overbearing, I must admit the existence at times of a somewhat uncere- monious manner. There are few counsellors holding a leading position, who do not exhibit, in the course of their professional lives, more or less of this. And in this connection I may repeat to you, that I have never witnessed professional civility of a higher or more uniform character than that exhibited by the gentleman who now fills the office of President of the United States, and by a learned brother, for years his opposing counsel at the bar, who has since adorned the bench of the Superior Court of New Hampshire. If with Mr. Webster there may at times have been some abruptness of expression, rendered more marked by the volume of his voice, I

have yet to learn any instance in which it degenerated into discreditable personal altercation.

Almost uniformly, his manner was that of courtesy to his opponents, and with rare exceptions, I think, that of respectful deference to the court.

The principal characteristics in his manner of speaking were dignity and earnestness; occasionally a manifestation of playfulness. It was rarely, however, that he sported with his subject, his object being to produce conviction rather than amusement or wonder. But he was by no means indifferent to the impression he might make upon those who were voluntary listeners, and held no portion of the power of decision.

He possessed great readiness in reply. He had great self-possession and self-reliance, but it was not the reliance of pretension. It was founded on tried and conscious power and ability to sustain himself. He had a most perfect command of his faculties. In the eulogy to which I have more than once alluded, there is an anecdote connected with some remarks upon his reply to Mr. Calhoun, in 1833, which furnishes a very remarkable illustration of his intellectual power and self-possession. "That high mastery," it is said, "over the subject, that fund of reserved power, with which he always impressed his hearers, was strikingly exhibited during the delivery of his speech, by a little incident which I happened to wit-

ness from standing in the crowd near the orator. At a moment when his argument seemed to demand his undivided attention, and when the powers of the assembly were most severely taxed in following him, and all were hanging on his lips, a package of letters was laid on his desk by a page of the Senate. Without at all arresting the course of his argumentation, except perhaps by a slight abatement of the fluency of his utterance, he opened his letters and cast his eye over them so as apparently to possess himself of their chief contents, by a perfectly contemporaneous process of thought; and thus gave demonstration that, great as was the occasion and the subject, he had mind enough for them *and to spare.*"

Assuming it to be true that the letters were not merely looked at, but that their contents were comprehended, it may be regarded perhaps as a proof of the duality of the mind. And it may well raise our admiration of the powers of him we now commemorate, to be assured that it required but the one half of his brain through which to carry on the process of reflection and argumentation necessary for that great constitutional argument, and that the other half could be at the same time absorbed in other, and perhaps entirely different, processes of thought, changing from moment to moment as successive and dissimilar subjects passed under review.

While his style has not the exuberant richness of that of Story, on the other hand, it is not limited to the severe simplicity which made effective the massive arguments of Dexter, nor to the terse energy which was conspicuous in the speeches of Calhoun. Nor did his arguments, like those of Pinkney, abound with gems "brilliant and sparkling."

Reared in the school of the common law, and in a part of the country where, as a distinct jurisdiction, a court of equity was unknown, — made familiar with nice technical distinctions, not only by his studies in the offices of Thompson and Gore, but by his practice by the side of Mason, and under the jurisdiction of Smith, — it may well be supposed that he had not studied the Roman law with the assiduity of Kent, and was not so much inclined to the infusion of a broad equity into our system of jurisprudence.

His most enduring fame as a jurist will rest more especially in the department of constitutional law, and there his appropriate position is precisely where you have placed him, — with Marshall and Story, — the defender of the Constitution by the side of its expounder and its commentator, — the latter occupying the central point, as the *genius loci*.

He derives his title to that position from his many constitutional arguments and speeches, and from his having been of the same school of constitutional law. Two of them on the bench, and one of these

in the lecture-room, and the third at the bar, in the halls of legislation, and in the primary assemblages of multitudes, have done more than any other three individuals to settle the construction of the Constitution. It was no small part of the labor of construction to adjust the new system to the existing systems with which it was connected, and upon which it was founded.

It is not to be denied that the doctrines of that school have already been the subject of modification, and that this process is not entirely completed.

But so long as the Constitution shall exist, and so long as any record of its history shall remain, wise men will do honor to the wisdom and firmness of those who framed and adopted it, and to the signal ability of its *expounder*, its *commentator*, and its *defender*.









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**Non-Extension of Slavery and Constitutional Representation.**

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AN

**A D D R E S S**

BEFORE

**THE CITIZENS OF CAMBRIDGE,**

**OCTOBER 1, 1856.**

BY

**JOEL PARKER.**

**CAMBRIDGE:**  
**JAMES MUNROE AND COMPANY.**  
**1856.**



The True Issue, and the Duty of the Whigs.

AN

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BEFORE

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SOME portions of this Address were necessarily omitted in the delivery, and the speaker for that reason remarked that he should have to follow the precedents in Congress, and ask leave to publish his speech. The response, to say nothing of subsequent requests, may be allowed to justify the publication of it entire. The Constitutional argument may perhaps be of some value.

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CAMBRIDGE:  
ALLEN AND FARNHAM, PRINTERS.

## A D D R E S S .

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MR. PRESIDENT AND FELLOW-CITIZENS:—

YOUR kind greeting encourages the belief that you will permit me to say a few words in the first person singular. The effect of what I may say at this time, supposing it to have any effect, may depend very much upon the character in which I appear before you. But, for another and a different reason, let it be distinctly understood, that I do not, upon this occasion, represent the sentiments of any department of Harvard College, and am not here as the Royall Professor. Upon some of the topics upon which I may speak, it would have given me pleasure to have held a free conversation with my associates in the Law School, but I sedulously avoided it in order to make this disclaimer, and have no reason to suppose that they concur in my opinions, except a belief that the doctrine is sound, and that they, therefore, as wise men, must approve of it.

I come before you, then, as a citizen of Cambridge, a constitutional lawyer, if you please, and especially as a Whig; as one who has been a Whig since the formation of the Whig party;—withdrawn in a measure from ordinary political contests, but known as a Whig.

It was said in 1852 that an eminent member of the Whig party prophesied that there would be no Whig party after the presidential election that year. Certain it is, that many of the friends of that great statesman did what they could to accomplish such a result by voting for the present occupant of the presidential chair. I was not "left" to do that, but supported, in good faith, the Whig candidate. When the citizens of Cambridge, in 1853, elected me a delegate to the Constitutional Convention, it was as a Whig. And at the last gubernatorial election, while approving to some extent the efforts of the American party, sympathizing with some of the principles of the Freesoil party, and honoring Governor Gardner for measures of his administration, which others of his friends disapproved, it did not appear expedient to separate myself from a party which still clung to existence, and I formed one of the forlorn hope which voted for the Whig nominee.

The result of that election showed very clearly that the party, as an effective party, no longer had any existence, and left to its members the inquiry,—With what party and in what connection shall a Whig hereafter endeavor to perform the duty which a good citizen owes to his country?

The Fugitive Slave Law of 1850 could not have had my vote, because there is no provision in it securing a trial to the fugitive on his rendition and return, and there are obnoxious sections which serve only to exasperate the citizens of the non-slave-holding States, and seem almost designed for the purpose of insult. But believing it to be, however unwise, a constitutional enactment, in my public teachings and private discourse, I have maintained the constitutionality of that law, and stopped a religious newspaper, conducted with great ability, on account of my disapproval of the encourage-

ment it gave to a forcible resistance to the execution of that law.

I may claim, therefore, to be a Whig, a Massachusetts Whig, a Conservative Whig, a National Whig; perhaps as sound an expositor of Whig principles as if I were a member of the Whig State Central Committee itself.

The events which have occurred within a recent period, have rendered the inquiry, "in what connection shall a whig hereafter endeavor to perform the duty which a good citizen owes to his country," one of exceeding interest. Notwithstanding the opposition to the Compromise Measures, as they were called, of 1850, the country was settling down to a quiet acquiescence, when in 1854 came the repeal of the Missouri Compromise Act of 1820. Some of you must well recollect the circumstances which occurred in 1819 and 1820, connected with the admission of Missouri into the Union;—the stern and determined opposition to its admission, unless coupled with a restriction of slavery within its limits. You doubtless recall the joy with which you hailed vote after vote in the House of Representatives, seeming almost to insure the triumph of freedom; and the revulsion of feeling, almost dismay, with which you learned, at last, that Missouri had been admitted without restriction, upon a compromise by which slavery was thereafter to be excluded from all territory north of 36° 30' north latitude.

This compromise was eminently a Southern measure, carried as such measures always are, by the aid of a few Northern votes; and it was treated for the time in the slave-holding States as something more sacred than ordinary legislative enactments;—as a kind of semi-constitutional law, securing all south of 36° 30' to slavery. A proposition to repeal it would have been a crime second only to



treason. But when, after the third of a century, the time came for the enjoyment of the equivalent supposed to be secured to the non-slave-holding States, it was all at once discovered that the compromise part was not only a mere legislative act, but that it was unconstitutional legislation. Then the doctrine arose, that slavery could not be excluded by Congress from the territories; and slavery having secured the benefit, rejected the burden attached to it, by a repeal of the restriction. Until very recently I had supposed that this repeal was a project of Mr. Douglas to secure the favor of the slave-holding States, and that the President was drawn in to its support, by the fear that Douglas would take the wind out of his sails in the approaching presidential boat-race; but a friend has just furnished me a copy of a New York paper containing what appears to be an authentic statement, derived from a gentleman who has spent several years in Western Missouri, showing that Douglas is not entitled to the credit, if credit it may be called, of originating the nefarious plot. His was only a secondary agency in wickedness. It seems that the Ahabs of Western Missouri have long coveted the fertile vineyard of Kansas as an addition to their slave-holding possessions, and that they determined to possess themselves of it after the manner of their great prototype, peaceably, if they could, forcibly, if they must.

Permit me to read an extract: —

“The slavery party in Missouri, under the lead of David R. Atchison, have long had their eyes upon the Kansas Territory, and were resolved upon the most desperate expedients to carry slavery there whenever it should be opened for settlement. Having no idea that it would ever be possible to procure the abrogation of the Missouri Compromise restriction, their plan was to keep every thing quiet as possible, until they could have every thing ready,

procure a territorial charter, slip over a sufficient number of their own men to elect a territorial legislature, and as soon as possible form a State government and get admitted to the Union, and before the people of the free States should suspect what was going on, establish slavery by an act of the new State legislature. In the latter part of 1853, almost a year before the passage of the Nebraska Bill, a public meeting was held in Platte county, Missouri, to consider the affairs of Kansas. Atchison made a speech, and was the master-spirit of the meeting; and it was

“*Resolved*, That if the Territory shall be opened to settlement, we pledge ourselves to each other to *extend the institutions of Missouri over the Territory*, at whatever sacrifice of blood or treasure.’

“These resolutions were published in the *Platte Argus*. This was long before Douglas had thought of venturing upon the repeal. The pledge there given is still operating upon those people, and its force precludes the idea that peace can ever come to Kansas, until it shall be fully admitted to the Union with its institutions all consolidated as a FREE STATE.

“This meeting attracted little public attention at the time, but it furnishes the key to all the subsequent history. Atchison has since explained the process by which he bullied and terrified Pierce and Douglas into the fatal measure of repealing the restriction. The Blue Lodges began to be formed immediately after; for it was testified before the Congressional Committee, by Jordan Davison, a Missourian and a Border Ruffian, that he was in a Blue Lodge at Pleasant Hill, Missouri, in February, 1854, the avowed object being to make Kansas a slave State, while the Nebraska Bill became a law on the 30th of June, 1854, and the Emigrant Aid Society of Boston held its first meeting on the 30th of July, 1854. A resolution was adopted on the 10th of June, at Parkville, Missouri, and within that and the following month was repeatedly adopted by other meetings both in Missouri and Kansas, debarring ‘abolitionists’ from entering Kansas,—in which term they include all friends of free labor,—declaring that the institution of slavery already existed in the Territory, and recommending to slave-holders to introduce their property as fast as possible.”

You have here what purports to be a copy of a resolution passed at a public meeting in Platte County, in 1853, and then published in the *Platte Argus*. It seems that there can be no mistake, and that the determination was then

formed to make Kansas a slave State at whatever sacrifice of blood and treasure. The ambition of Douglas, and the fears of the President, were appealed to for aid and support by a repeal of the Compromise; and thereupon the political Nebuchadnezzars, who ought to have been turned out to grass long since, erected an image, composed mainly of brass, styling it "squatter sovereignty;" — and General Cass fell down and worshipped it.

It is not necessary to detail to you how the doctrine, that the settlers of a territory have a right to determine their own institutions, has since been carried out in practice by those who promulgated it. The ruffians of Western Missouri, true to their determination to extend their institutions over Kansas, marched over the border well provided with bowie knives and revolvers, voted where that served their purpose, destroyed the ballot-boxes where that was better, drove the Free State voters from the polls, and elected a majority of the territorial legislature. A more gross case of usurpation never existed. But this was only the beginning of what is not yet ended. The usurping legislature met, turned out the members who were legally elected, and proceeded to pass a set of laws which would disgrace Turkey or Algiers. The inhabitants protested, and refused to recognize the authority of the usurpers, and were maltreated, beaten, and some of them murdered. They appealed to the United States authorities for protection; and the answer received reminded me at the time of an anecdote I read several years since, and which, being professional, has dwelt upon my recollection. A lawyer named Jones, with no great knowledge of the law, had become "cock of the walk" in one of the county courts of Virginia, and managed the court at his pleasure. A young lawyer settled in the county, and having superior pro-

fessional knowledge, interposed legal objections in one of Jones's suits, which the latter could not answer; and he thereupon became very much enraged, and swore profanely. The young advocate finally appealed to the court with the question, whether it was proper for Mr. Jones to swear in the presence of the court. The court held a grave consultation, and delivered judgment in this wise: "Mr. H., if you don't leave off making Mr. Jones swear so, the court will commit you." So seemed to be the answer of the general government to the appeal of the Free State settlers of Kansas for protection. "Gentlemen, if you don't leave off making these border ruffians commit all this violence, you shall be arrested for insurrection."

But the matter soon became too serious for a jest respecting it. The threats of arrest, it soon appeared, were no empty menace. To all appeals for protection, the answer was, "You must obey the laws." And what were the laws to which obedience was thus required? Permit me to give you a specimen of them.

"If any free person, by speaking or by writing, assert or maintain that persons have not the right to hold slaves in this Territory, or shall introduce into this Territory, print, publish, write, circulate, or cause to be introduced into this Territory, written, printed, published, or circulated in this Territory, any book, paper, magazine, pamphlet, or circular, containing any denial of the right of persons to hold slaves in this Territory, such person shall be deemed guilty of felony, and punished by imprisonment at hard labor for a term of not less than two years.

"No person who is conscientiously opposed to holding slaves, or who does not admit the right to hold slaves in this Territory, shall sit as a juror on the trial of any prosecution for any violation of any of the sections of this act.

"If any person offering to vote shall be challenged and required to take an oath or affirmation, to be administered by one of the judges of the election, that he will sustain the provisions of the above-recited acts of Con-

gress, [the Fugitive Slave Laws of 1793 and 1850,] and of the act entitled 'An Act to organize the Territories of Nebraska and Kansas,' approved May 30, 1854, and shall refuse to take such oath or affirmation, the vote of such person shall be rejected.

"Each member of the legislative assembly, and every officer elected or appointed to office under the laws of this Territory, shall, in addition to the oath or affirmation specially provided to be taken by such officer, take an oath or affirmation to support the Constitution of the United States, the provisions of an act entitled 'An Act respecting fugitives from justice and persons escaping from the service of their masters,' approved February 12, 1793; and of an act to amend and supplementary to said last-mentioned act, approved September 18, 1850; and of an act entitled 'An Act to organize the Territories of Nebraska and Kansas,' approved May 30, 1854."

"Every person obtaining a license shall take an oath or affirmation to support the Constitution of the United States, and to support and sustain the provisions of an act entitled 'An Act to organize the Territories of Nebraska and Kansas,' and the provisions of an act commonly known as 'The Fugitive Slave Law,' and faithfully to demean himself in his practice to the best of his knowledge and ability. A certificate of such oath shall be indorsed on the license.

"If any person shall practise law in any court of record, without being licensed, sworn, and enrolled, he shall be deemed guilty of a contempt of court, and punished as in other cases of contempt.

"Every person who may be sentenced by any court of competent jurisdiction, under any law in force within this Territory, to punishment by confinement and hard labor, shall be deemed a convict, and shall immediately, under the charge of the keeper of such jail or public prison, or under the charge of such person as the keeper of such jail or public prison may select, be put to hard labor, as in the first section of this act specified; and such keeper or other person having charge of such convict, shall cause such convict, while engaged at such labor, to be securely confined by a chain six feet in length, of not less than four sixteenths nor more than three eighths of an inch links, with a round ball of iron of not less than four nor more than six inches in diameter, attached, which chain shall be securely fastened to the ankle of such convict with a strong lock and key; and such keeper or other person having charge of such convict, may, if necessary, confine such

convict, while so engaged at hard labor, by other chains or other means in his discretion, so as to keep such convict secure and prevent his escape; and when there shall be two or more convicts under the charge of such keeper, or other person, such convicts shall be fastened together by strong chains, with strong locks and keys, during the time such convicts shall be engaged in hard labor without the walls of any jail or prison."

You perceive how cunningly devised this code was to secure the introduction of slavery into Kansas. All persons opposed to slavery were disfranchised and gagged. If they dared to speak even against the right to hold slaves in the territory, they were to be deemed guilty of felony, and subjected to imprisonment at hard labor for a term not less than two years, and might be let out to work on the public highway, fettered with a chain and ball, after the manner of those convicted of the most infamous crimes under the worst of despotisms.

Fellow-Citizens! If the people of Kansas had quietly submitted to this usurpation and oppression, they would have deserved to be slaves themselves; nay, the very act of submission would have made them slaves. The wrongs inflicted on the colonists by the mother country, which led to the Revolution, bear no comparison with this monstrous injustice.

The people attempted to relieve themselves in the only way which seemed to be practicable, without a resort to violence. Following the example set by the people of Michigan, they chose delegates to a Convention for the formation of a Constitution, in advance of an authority for that purpose, and asked for admission into the Union as a State. But what was good constitutional allegiance in Michigan, was treason in Kansas. A refusal to be gagged, was insurrection; and asking to be admitted into the Union as peacea-

ble citizens, desirous of escaping from oppression, was treason against the peace and dignity of the United States. The more prominent of the free State settlers who did not escape were arrested and imprisoned on this charge of treason, while reiterating their protestations of allegiance and devotion to the Union, and for the crime of seeking admission into it; and armed bands, coming from abroad to secure the ascendancy of slavery by force, were let loose, to ravage the possessions of those whose only offence was that they were supporters of free institutions. Our fathers had no very favorable opinion of the Hessians in the war of the Revolution. But the Hessians were not volunteers in the attempt to subjugate the colonists, and committed no atrocities beyond those usually attendant upon a state of warfare. Not so with the bands of ragamuffins who have invaded Kansas. It has been said that civil war was raging there. My friends, let us do no injustice to civil war. It has horrors enough to answer for which properly belong to it. But the robbery and arson, the pillage and murder which have been rife in Kansas within the last year, are not civil war. I intend no pun in saying this. The case is too grave and sad for that. I mean to say that it is not war which has raged in Kansas; but it is rapine and destruction, and cold-blooded, wilful murder. We have been accustomed, when we wished to express our sense of the damning infamy of atrocious deeds of violence or plunder, in the superlative of condemnation, to characterize them as piracy, and the perpetrators as pirates. But it has been reserved to the Atchison men, and the Buford men, and the Titus men, and the Emory men, in Kansas, to make piracy comparatively respectable, inasmuch as they have shown that there is a depth of infamy more profound than pirate ever yet has sounded. The buccaneers of former

days did not hold out a false signal of equal rights, and then gag and plunder and murder their victims, under the hollow pretence of being a territorial militia, enforcing the laws.

The result of this horrible iniquity has been stated in the appeals for aid recently made to the people of the Eastern States. God grant that hearts may feel and hands may open as they never felt and opened before, in aid of the Free State settlers in Kansas, that the storms of the coming winter may not sweep over the desolate hearthstones of those who have perilled their all in the cause of freedom.

It has been said in high quarters and low quarters that all the difficulties in Kansas have been occasioned by the Emigrant Aid Society; that if it had not been for the interference of that Society, Kansas would in the natural course of things have come in quietly as a free State. But the resolution of the Platte County borderers, adopted before the Emigrant Aid Society was even thought of, show the utter hollowness and falsity of all such pretences. I have no authority to speak for the Emigrant Aid Society, and know nothing of its plans and purposes except what is before the public. I am willing to take it for granted that the main object of that society was to facilitate the introduction of settlers into Kansas with a view of making it a free State, and perhaps of ultimately deriving a profit to the corporation. If it were solely with the purpose of aiding in the settlement, with the view of securing the Territory to freedom, it was a perfectly legitimate object. The repeal of the Compromise opened the Territory to such efforts on both sides. It was just what was to have been anticipated. So long as the effort was made in good faith to promote actual settlement, no reasonable exception could be taken.— It was the introduction of those who were not settlers, for the purpose of voting and over-



awing the inhabitants, which furnished ground of complaint; and I have yet to learn that there is a particle of evidence that the Emigrant Aid Society has done any such thing. What has been charged upon it was that it paid the expenses of emigrants, which it had a perfect right to do, but which it denies having done.

I am aware that near the close of the examinations before the investigating committee of the House of Representatives, some testimony was introduced to the effect that two or three persons who were leaving the Territory just after the election, said the Emigrant Aid Society paid their expenses to come there and vote. Some reckless person may so have said, but I doubt it. If the declaration were made under the circumstances stated, it would furnish no proof against the society or its members. But no such charge was made or suggested until the damning proof of illegal voting by the Missourians required some set-off, if one could possibly be conjured up. And then came this proof of declarations by nobody knows who. It was entirely an after-thought. No one with a grain of common sense, and any knowledge of the facts, ever believed a word of it. It may be true that if Kansas becomes a free State it will be owing to the lawful and judicious action of the members of the society, counteracting the unholy projects of the border slave-holders, and the unscrupulous politicians. This is the head and front of its offending. Honor, then, to the Emigrant Aid Society. Honor to the City of Lawrence, which it founded, and to its Free State hotel, the walls of which still stand, notwithstanding the patriotic labors of the sheriff's posse. And, above all, and beyond all, honor to the stout hearts and strong arms which have resisted oppression, and abide the issue with the stern determination that Kansas shall be free.

It was but a matter of course that great interest should be manifested respecting the course of the different political parties on the subject in the impending presidential election. There are three parties in the field, and we have their platforms before us. It may be well to devote a few moments to a review of them. The Democratic Convention have collected together a mass of truisms about which no controversy exists, and reëndorsed their adhesion, nominally, to all that they have maintained heretofore. There is a declaration of eternal hostility to a National Bank. As the Bank was killed by General Jackson, about a quarter of a century ago, and Mr. Webster long since characterized it as an obsolete idea, this plank of the platform was probably designed as a wooden slab, to be placed over its grave. There is a resolution in favor of the veto power, and another against a system of internal improvements. But a democratic Senate having, within a few days, passed bill after bill making appropriations for internal improvements, over, and notwithstanding, the President's veto, it seems clear that these are shifting planks of the platform, which can be removed at any time when the party is in danger, if it stand too firmly upon them. There is a resolution in favor of the sub-treasury, respecting which no one now proposes a change; and one against fostering one branch of industry at the expense of another, which no one seeks to do. There is a resolution that it is the duty of the government to enforce and practise the most rigid economy in conducting our public affairs — exemplified by a most wasteful and extravagant expenditure whenever the party is in power; and one in favor of a strict construction of the Constitution — which the party uniformly construes in the most lax manner, or wholly disregards upon flimsy pretexts, whenever it suits their purposes. Witness, for ex-

ample, the admission of Texas, with an agreement that it shall be divided into five States, there being no constitutional authority for the admission, or the agreement. There are resolutions against the American party, the design of which is to secure the vote of the naturalized citizens, while the party privately makes love to the American party, and proposes a union whenever the defeat of the Republican party shall require it. So much for show and humbug ; and then comes the plank of planks, in the denunciation of the Republican party as a sectional party, in the support of the extension of slavery by the repeal of the Missouri Compromise, — in the nominal recognition of the right of the inhabitants of the territories to form their own institutions respecting slavery, — a principle which the party were violating in Kansas at the very time it was promulgated ; closing with a call upon the next administration for every proper effort to secure our ascendancy in the Gulf of Mexico ; which means, being interpreted, that measures be taken to give Cuba the opportunity to form her institutions, in the faith that she cannot form them amiss in relation to slavery.

The American party, or rather the southern section of it, after a political thanksgiving, presents the perpetuation of the Federal Union, the recognition of the reserved rights of the States, non-intervention in those things that belong exclusively to individual States — opposition to a union between church and state — investigation into abuses, and strict economy ; respecting all which, that party has no distinctive features. There is, besides, the maintenance and enforcement of all laws, until said laws shall be repealed, or shall be declared null and void by competent judicial authority, which is broad enough to embrace the enforcement of the laws of the usurping legislature of Kansas, and was probably de-

signed to cover that very case, in the slave-holding States at least. Witness the nomination of Donelson, to say nothing, just now, of Mr. Fillmore. The remaining portion relates mainly to the distinctive principle of that party, that "Americans must rule America."

The Republican party, addressing its call to all without regard to past differences, who agree in its principles, first resolved "that the maintenance of the principles promulgated in the Declaration of Independence, and embodied in the Federal Constitution, are essential to the preservation of our republican institutions, and that the Federal Constitution, the rights of the States, and the union of the States, shall be preserved." This, with an indorsement of some particular principles of the Declaration and of the Constitution may be regarded as "the glittering and sounding generalities" of the platform. The application of these principles to the non-extension of slavery, with a recital of the wrongs of Kansas and a resolution in favor of her admission under the Topeka constitution, the denunciation of the highwayman's plea, that "might makes right," and a declaration of opposition to all legislation impairing the security of liberty of conscience and equality of rights among citizens, furnish the fanatical and sectional portion of it. There is besides a support of a railroad to the Pacific, and other internal improvements of a national character.

There is nothing in the platform of either of these parties adverse to the integrity of the Union. On the contrary, each professes its entire devotion to it. And the Union is in just about as much danger from the success of one as that of another. The dissolution of the Union is not dependent immediately upon the issue of this election. The great, the all absorbing issue in the controversy is the extension or

non-extension of slavery into Kansas, and the Union is eventually in quite as much danger from its extension as from its non-extension, although there is not so much said about it. I am free to admit, that if slavery is imposed upon Kansas and such a monstrous iniquity as has occurred shall be approved, my faith in the virtue and capacity of the people to sustain a wise and just republican government will be somewhat shaken. If the people so decide, "God save the Commonwealth." But they are too much aroused just now to permit any such thing. Of prophecies and threats there has been an abundance. It is asserted that somebody has said, "if slavery is extended, the Union is worthless and ought to be dissolved." And somebody has said, that if sixteen States elect a President, fifteen States won't stand that. And somebody else has said, that if Colonel Fremont is elected it will be the duty of somebody to march to Washington and seize the archives and the treasury. I had rather have the sub-treasury at New York than the treasury. These exhibitions of froth and folly are not all on one side of any particular line. Nor do the people who make them all wear petticoats; but it is true that some of them come from old grannies, whose age and experience should have taught them better.

We have seen that the real issue in the present Presidential canvass is between the Democratic and the Republican parties, — the extension or the non-extension of slavery. All other matters are at this time of minor import. The distinctive principle of the American party, be it good or bad, is out of sight at present, swallowed up in the all absorbing question whether slavery shall be imposed upon Kansas. The party may perhaps preserve its organization. The result of its action in this election will avail it nothing further;

but its capacity for mischief by a pertinacious adherence to its candidates may be very great.

What is the duty of the Whigs? What is now the duty of those who, with a steady adhesion to their principles and a cheerful devotion to the cause, have followed the glorious Whig banner so long as it was flung to the breeze, alike conscious of a faithful performance of duty, whether in victory or defeat?

Some of those who have heretofore been prominent members of the Whig party have announced their intention to support Mr. Buchanan. It has been reported, that a distinguished gentleman of our own State upon being rallied upon his transition from the Whig to the Democratic party, replied, that if he was about to leave the ranks of Orthodoxy he would not stop at Arminianism, but would go on to infidelity at once. What a marvellous felicity of illustration that gentleman possesses!

Another gentleman known as a Whig, a senator from Missouri, in declaring his intention to vote for Mr. Buchanan, says, "while I cannot approve and do not intend to adopt the platform of principles promulgated by the late Democratic convention at Cincinnati, I feel assured that notwithstanding the exceptional doctrines it announces, especially those referring to our foreign relations, the administration of Mr. Buchanan would be safe, prudent, and conservative." For myself, I do not understand this support of Mr. Buchanan without adopting his platform. It is said that he is the platform. There is no such separation to be made. If you vote for the man, you vote for the platform, for he is pledged to it. A man may

"Steal the livery of the court of heaven  
To serve the devil in."

But the service he performs will be a devilish service, and the anthems he sings will not be "holiness to the Lord." A man may train in the Democratic ranks with a Whig overcoat on, but he must hurrah for the Democratic candidates and keep step to the music of the Democratic party. The outward • habiliments will not determine the character. The ass covered his shoulders with the lion's skin, but the tremendous roar which he expected would follow turned out to be nothing but the bray of the donkey, after all.

Let no Whig vote for Mr. Buchanan with the supposition that the Democratic party have changed their policy respecting Kansas. Up to the time of the election in Maine, no measures were taken by the administration for the relief of the Free State settlers. To all appeals the answer was, "Obey the laws." Mr. Governor Geary, upon whose appointment there were some hopes of an intention to mete out a better measure of justice, made haste very slowly to assume the duties of his office, notwithstanding the disorders which it was his duty to suppress were most notorious. It seemed as if he was purposely kept back until that election should give some indication of the feeling of the people. If every thing went well in Maine, then Woodson might be left to follow the course of Shannon, and the banditti permitted to pursue their ravages as territorial militia. The eighteen thousand pounder in Maine struck terror and dismay into the administration at Washington, and the echoes were forthwith heard in Kansas. Mr. Geary made all speed about that time to his government, and the St. Louis News, before he reached that point, proclaimed that there was a lull in the affairs of Kansas. Atchison, with his invading army, was probably told, "It won't do, you must go back or Buchanan will be defeated;"—while the arrest of some 130 Free State

men on a charge of treason and murder, for attacking those who had been committing depredations upon them, may serve to satisfy even the border ruffians that their interests are well cared for in the mean time. How long the "lull" will last, remains to be seen. Whether the storm will rage again may depend upon which way the wind blows on the 4th of November.

Others of the Whigs, not being willing to go to the ——, I beg your pardon, gentlemen, — not being willing to go into infidelity in this way, have sought some other association. A convention calling itself a Whig Convention, was held a short time since in this State. That there were Whigs in it I have no doubt; but there is some evidence that it was not a Whig convention. The suppression of a reasonable discussion, and by unearthly noises, is neither Whig principle nor Whig practice. But let that pass. You doubtless looked with solicitude for the views of the convention upon the great question of the canvass, — the only question of practical importance. The presiding officer, professing to give a somewhat full and formal expression of opinion in relation to the momentous issues now before the people of the United States, says of Kansas, —

"I cannot forget, moreover, that there are diseases in the political, as well as in the physical system, for which mere local applications and mere topical treatment are utterly insufficient and often injurious, and where the only hope of a radical cure is in purifying and invigorating and building up anew the general health of the patient. Wise physicians in such cases prescribe what I believe they call an *alterative* medicine. And this deplorable Kansas malady will, in my opinion, prove to be precisely one of this class of disorders. It demands an *alterative*; and those who rely so much upon direct applications for the relief of the superficial symptoms, distressing as they are, will find themselves, I fear, grievously disappointed."

It appears to me that the symptoms have not been very



superficial. We all agree that an alterative is necessary; but what is to be the particular medicine? Pills of lead and powders of gunpowder are very powerful alteratives, but they do not generally improve the condition of the patient.

There is some significance in the inquiry afterwards made by the presiding officer in the course of his speech. What had a Republican House of Representatives "accomplished for suffering, bleeding Kansas?" (Not very superficial!) Adding, "does any man here doubt that if men of less extreme and extravagant views, men more conciliatory and practical in their purposes, had been in Congress, those odious and abhorrent Kansas laws would have been repealed before the session closed?" How this repeal might have been accomplished is not said. Men more conciliatory and practical in their purposes, might probably have obtained a repeal of some of those odious and abhorrent laws by the *compromise* of voting for Toombs's bill, which would assuredly have sealed the fate of Kansas, and made it a Slave State beyond redemption.

Another distinguished speaker, and a personal friend, said:—

"How any man can acquit the administration of President Pierce from being the source and origin of most of the disorders which are now distracting that region and spreading their exciting influence over the country, I cannot see. I admit that all the elements of trouble in that territory are not directly chargeable to the administration; but the administration was responsible,—first, for the repeal of the Missouri Compromise, and then for its course in countenancing the illegal votes from a neighboring region which put into power a legislature which had the forms of law, but which in its election and rule was an embodiment of injustice; and for giving its support to the measures of that body, which are disgraceful to humanity, disgraceful to liberty, and disgraceful to the spirit of the age. Now the duty of the administration was as plain as the light of the sun at noonday. The whole of this work should have been undone. This legislature should have

been sent home, and the whole of their legislative action should have been annulled, as the acts of a legislature which had no right to sit."

This is good sound Whig doctrine. But see what immediately follows : —

"The difficulty about Kansas is that it is a card in the hands of politicians during the coming campaign. When the truth about Kansas is known, you will find that some of the men who have been most loud in denouncing the Kansas outrages, have been the most vigorous in preventing the measures which are calculated to give peace to that territory."

This sounds very much as if the Republicans, who have certainly been most loud in denouncing the Kansas outrages, have prevented the adoption of such measures as the speaker had just said ought to have been taken. But he will hardly assert that. The Republicans held the card, if there was a card of that sort to be played. Why did not the Administration trump that card? They held the trump, in the shape of the admission of Kansas under the Topeka constitution. That would not only have taken the card, but would have ended the game, so far as Kansas was concerned. But that was just what the slave-holding partners of the Democracy would not consent to do.

What measures have the Republican party prevented, which were calculated to give peace to Kansas? Why, they have prevented the passage of Toombs's bill; and they have most vigorously refused to compromise in such a manner that slavery will make sure of Kansas.

The presiding officer, referring to the possible success of the Democratic party, identified as it is with the overthrow of the Missouri Compromise and the unjustifiable foreign policy disclosed and avowed in the Ostend Conference, says : —

"I can see before us no promise, and but little prospect, of either domestic or foreign peace. There is no alternative here. On the contrary, such a result presents to my mind nothing but an indefinite continuance and prolongation of that wretched state of things which has distressed the heart of every true patriot for the last six or seven months,—fears without and fightings within, the abomination of desolation standing where it ought not, fresh conflicts upon our own soil springing from the squatter sovereignty doctrines which have been so disastrously inaugurated in Kansas, and fresh panics of war with foreign powers, disturbing our trade and finances, and followed, perhaps, by the dread catastrophe itself."

But he adds : —

"If I turn, on the other hand, to a contemplation of the triumph of the Republican party, I perceive clouds and darkness, by no means less dense or threatening, resting upon the future of our domestic peace."

Now, the main purpose of the Republican party is to prevent the accomplishment by the Democratic party of what it is here said is the very "abomination of desolation." So it seems that it is just about as dangerous to prevent iniquity as it is to commit it.

The Convention resolves that the fierce and dangerous elements of discord let loose by the repeal of the Missouri Compromise, "can never be put to rest until that healing measure shall be practically reënacted, and the territory once solemnly dedicated to freedom be received into the Union as a free State." And then they cannot refrain from expressing their preference for Mr. Fillmore. That is, in other words, a recommendation to vote for him. What, and Donelson, too? Yes, and Donelson, too! You cannot scratch that ticket, because you vote for electors, who, if they vote for Fillmore, will vote for Donelson, too. Well, what kind of a Whig is Mr. Donelson, "I should very much like to know!" A Democratic slaveholder of Tennessee, on the South American

ticket, editor of the Washington Union during Mr. Fillmore's administration, and an "uncompromising opponent of Whig men and measures,—condemning indiscriminately" all of it that was Whig. How far is Mr. Donelson likely to promote the admission of Kansas as a free State, or to oppose the acquisition of Cuba for the express purpose of adding more slave territory?

But is there any expectation on the part of the Convention, that Mr. Fillmore can be elected? Hardly. The presiding officer is "prepared, if need be, to try how it feels to vote without any State at all," although he hopes better things. Rather faint, that. But my eloquent friend is more explicit:—

"Only stand firm," he says, "only let us weather this next point, and depend upon it, we shall have smoother seas, and more favoring gales the next year. I only ask you, while you are firm, while you are zealous, to be also patient and forbearing to one another. The duty that is at this moment laid upon the Whig party is one that most tries the temper and the soul of man. It is that which calls for the exercise of the passive virtues, and they are always harder to bring out than the active virtues. It is an easy thing, when the trumpet sounds, when the air rings and burns with exhilarating shouts, when the pulse beats high, and the blood in the veins seems turned into liquid fire,—it is easy then to fling one's self into the face of the enemy, and meet victory or death. But to stand still, and have your ranks mowed down by the enemy's artillery,—to see your friends and brothers falling on each side,—to hear no word but the calm grave voice of the commander, 'Close up your ranks, boys, and show a firm front to the foe,' that is hard; but we are of the stuff that can do it."

So it appears that at a time of great excitement in the country, while there are fears without and fightings within; while the abomination of desolation stands where it ought not; while there is no promise and but little prospect of either

foreign or domestic peace in the success of the Democratic party, which has originated all the troubles, while a great battle is to be fought between slavery and freedom, the Whig party is to denounce the Republican party, which does battle for freedom, as one upon whose success clouds and darkness rest, and to be brought into the field, standing shoulder to shoulder, — *to fire at a target.*

If this is done, it is thought that the party will live to fight another day.

“Depend upon it, Mr. President,” (says the last speaker,) “the time will come when the tide of battle will turn; when ‘either night or the Prussians will come,’ as Wellington said at Waterloo; when along our ranks will ring, as did there, the stirring words, ‘Up, Guards, and at them.’”

At whom? Why, the victorious party, whichever it may be, intrenched in the government fortifications. It would be unkind to make such a charge upon the remnant of the vanquished.

Mr. President! when that command shall speed over the hills, and echo along the valleys of New England, I doubt not that there will be a mustering of gallant riders, and an exhibition of noble horsemanship. But the roll call will show about the number of the glorious six hundred at the battle of Balaklava, — the charge will accomplish as much for the purposes of the war, — and there will be not far from the same proportion of empty saddles.

Fellow-Citizens! I may be old, but I am no foggy. If there is to be a great political battle, in which the slave power, assuming the name of Democracy, is arrayed against the personal liberty of one class of the people, and against the equal political rights of another class, I wish to enroll

myself in the ranks and do a yeoman's service. I cannot be brought into the field in the heat of the battle, under any leaders, — to shoot at a mark.

But I have other reasons why I cannot vote for Mr. Fillmore. Mr. Fillmore in the Presidential chair was not the same Whig Mr. Fillmore who was previously a representative in Congress. And Mr. Fillmore deserting the Whig party upon its defeat in 1852, and joining a party whose distinguishing principle, be it good or bad, is not a Whig principle, — is no kind of a Whig. Moreover, Mr. Fillmore, on his return from Europe this summer, made a speech at Albany. I could not find it in one of his Boston organs the other day, where his speeches at Newburg and Rochester and other places on his route seemed to be stereotyped; but copies of it are extant, and these are extracts: —

“We see a political party, presenting candidates for the Presidency and Vice-Presidency, selected for the first time from the free States alone, with the avowed purpose of electing these candidates by suffrages of one part of the Union only, to rule over the whole United States. Can it be possible that those who are engaged in such a measure can have seriously reflected upon the consequences which must inevitably follow, in case of success? (Cheers.) Can they have the madness or the folly to believe that our Southern brethren would submit to be governed by such a Chief Magistrate?

“Suppose that the South, having a majority of the electoral votes, should declare that they would only have slave-holders for President and Vice-President, and should elect such by their exclusive suffrages to rule over us at the North? Do you think we would submit to it? No, not for a moment. (Applause.) And do you believe that your Southern brethren are less sensitive on this subject than you are, or less jealous of their rights? (Tremendous cheering.) If you do, let me tell you that you are mistaken. And, therefore, you must see that if this sectional party succeeds, it leads inevitably to the destruction of this beautiful fabric reared by our forefathers, cemented by their blood, and bequeathed to us as a priceless inheritance.”

This is a direct encouragement to insurrection, or secession by the slave-holding States, if the Republican candidate is elected; and all the more exceptionable coming from his competitor. It is not surprising that there have been divers glosses upon it, attempting to show that Mr. Fillmore did not mean what he said; but the meaning is quite plain, and if the truth were known, probably much of the violence and threats, of which we hear not a little, might be traced to it.

But suppose Mr. Fillmore had a chance of success. I do not wonder that this supposition provokes your laughter; but what is called a National Whig Convention has recently been held at Baltimore, and has indorsed, the nominations of the American party, and expressed something like a confidence in his success. I deny the authority of a portion of the Whigs to indorse the nominations of another party in the name of the Whig party. But being thus indorsed how is the election to be accomplished, and what is to be the result? The answer is clear. By defeating an election by the people, throwing it into the House of Representatives, and then standing out in the expectation that the Democratic party will give in. An election is thus to be postponed,—the whole country convulsed with the excitement which will attend it,—and the matter is to be accomplished at last by bargain and corruption, making Kansas the subject of a compromise. Compromising seems to have been considered as Mr. Fillmore's peculiar qualification in the convention at Boston. The presiding officer evidently regarded compromising with favor:—

“In my honest judgment, fellow Whigs, if these perplexing and perilous questions are ever to be settled wisely, justly, and peaceably, it will not be by the triumph of either of the principal parties to the strife.”

Another speaker is again more explicit, —

“ Now Mr. Fillmore has the support of many members of the Whig party on the ground that he is a man of that moderation of temper who will reconcile the extremes of opinion on both sides. Nothing but harm can come, if this attitude of opposition and collision between the North and South is to continue. Millard Fillmore stands in the position of a man who takes that moderate part which is never tasteful to the American people. It is one of the characteristics of the people to favor extreme measures. Moderation, conciliation, and compromise — that class of qualities and that class of virtues — is not taking to the common American mind.”

This is somewhat more clearly foreshadowed in the Baltimore Convention. — But what is the compromise? The question is, Shall slavery be extended into Kansas — Yes or No? If you say no, you do not compromise. If you say yes, you surrender. The election of Mr. Fillmore, then, is compromise, and compromise is surrender.

But it is objected that the Republican party is a fanatical party and a sectional party, and that it is seeking to deprive the Southern States of their rights under the constitution. Some of this was said in the speeches at the convention in Boston. More by the speakers from the free States at the Convention in Baltimore, and all of it is iterated and reiterated by the Democratic party, aided, as we have seen, by Mr. Fillmore himself. In reading the proceedings of the Baltimore Convention, I was struck with the fact that gentlemen from the slave-holding States hardly referred to the Republican as a sectional party, while those from the free States were open-mouthed in that style of denunciation. A delegate from New York “referred at some length to the duty of the South to stand by those Whigs of the North in support of Mr. Fillmore — to the necessity of the maintenance of the Union, despite the fanatical efforts of the abolitionists of the North.”



It is amusing to contrast this with a remark of Mr. Alexander Rives of Virginia, who said, "I hail from the South — my heart throbs with every emotion that can touch the heart of a Southern man. But yet I tell you that from my heart of hearts, I loathe the Northern man with Southern principles. [Applause.] Bring a man from the extreme North, and set him down in my own cherished domicil, and let him strive to outvie me in praises of the institutions of the South, and I say he ought to be kicked out of doors."

Fellow-citizens, I do not recognize the old Anti-slavery party, nor even the Freesoil party proper, in the present Republican party. With something in common with the former, and much with the latter, it is not the same. The Republican party presents, as its great distinguishing principle, the non-extension of slavery, and I propose to show that this is a sound Whig principle, and a constitutional principle, — which once might have been said to be the same thing.

To show it to be a Whig principle, I need go no farther back than the 29th of September, 1847. On that day the Whig party of Massachusetts held a convention at Springfield. Mr. Webster was present, "and addressed the meeting in his most powerful manner for nearly an hour and a half. His speech was devoted to a review of the war and its origin, and the policy of the administration with regard to it." Two or three short extracts from that speech may be found useful.

"My opposition [to the annexation of Texas] was founded on the ground that I never would, and never should, — I repeat now, I never will and never shall, — give my vote in Congress for any further annexation to this country with a slave representation. . . .

"We hear much, just now, of a panacea for the danger and evils of slavery and slave annexation, which they call the Wilmot Proviso. That sentiment is a just sentiment, but it is not a sentiment to form any new party

upon. It is not a sentiment on which Massachusetts Whigs differ. There is not a man in this hall who holds to it any more firmly than I do, or one who adheres to it more than another. I feel some little interest in this matter, Sir. Did I not commit myself in 1837 to the whole doctrine, fully, entirely? And I must be permitted to say that I cannot quite consent that more recent discoverers should claim the merit and take out a patent. I deny the priority of their invention. Allow me to say, Sir, it is not their thunder." . . .

"We can only say, and in my judgment, Mr. President, I can only say, that we are to use the first, the last, and every occasion that offers to oppose the extension of slave power. But I speak of it here as in Congress, as a political question for statesmen to act upon. We must so regard it. I certainly do not mean to say it is less important in a moral point of view, — that it is not more important in many other points of view. But as a legislator, or in an official capacity, I must look at it, consider it, and decide it, as a matter for political action."

The platform of that convention contained a very full and emphatic annunciation of Whig principles. It was resolved, among other things,

"That the acquisition of Mexican territory, under the circumstances of the country — unless under adequate securities for the protection of human liberty — can have no other probable result than the ultimate advancement of the sectional supremacy of the slave power.

"That if the war shall be prosecuted to the final subjugation or dismemberment of Mexico, the Whigs of Massachusetts now declare, and put this declaration of their purpose on record, — that Massachusetts will never consent that Mexican territory, however acquired, shall become a part of the American Union, unless on the unalterable condition that 'there shall be neither slavery nor involuntary servitude therein, otherwise than in the punishment of crime.'

"That, in making this declaration of her purpose, Massachusetts announces no new principles of action in regard to her sister States, and makes no new application of principles already acknowledged. She merely states the great American principles embodied in our Declaration of Independence — the political equality of persons in the civil State; — the principle adopted in the Legislation of the States under the confederation, and sanctioned by

the Constitution ; in the admission of all the new States formed from the only territory belonging to the Union at the adoption of the Constitution ; — it is, in short, the imperishable principle set forth in the ever memorable ordinance of 1787, which has for more than half a century been the fundamental law of human liberty in the great valley of the Lakes, the Ohio and the Mississippi, with what brilliant success, and with what unparalleled results, let the great and growing States of Ohio, Indiana, Illinois, Michigan, and Wisconsin, answer and declare.

“ And that uncompromising hostility to all wars for conquest, and to all acquisitions of territory in any manner whatever, for the diffusion and perpetuity of slavery, and for the extension and permanency of the slave power, are now — as they have been — cardinal principles in the policy of the Whigs of Massachusetts, and form, in their judgment, the broad and deep foundations on which rest, and ever must rest, the prospective hopes, and enduring interests of the whole country.”

There has been no repeal of these resolutions.

With regard to Mr. Webster, who may be allowed by the Whig friends of Mr. Fillmore to have been a sound exponent of Whig principles, his opposition to the extension of slavery was distinctly expressed in a speech at Niblo's Garden in New York, in 1837 ; and he adhered to it throughout his whole life.

When the bill to establish a territorial government in Oregon was under consideration in August, 1848, Mr. Webster said : —

“ For one, I wish to avoid all committals, all traps by way of preamble or recital ; and as I do not intend to discuss this question at large, I content myself with saying, in few words, that my opposition to the further extension of local slavery in this country, or to the increase of slave representation in Congress, is general and universal. It has no reference to limits of latitude or points of the compass. I shall oppose all such extension and all such increase, in all places, at all times, under all circumstances, even against all inducements, against all supposed limitation of great interests, against all combinations — against all compromises. This is short, but I hope clear and comprehensive.”

It may be noted as a curious piece of political history, that Mr. Douglas moved an amendment to the bill, in favor of extending the Missouri Compromise to the Pacific Ocean, which was adopted by the following vote : —

YEAS — Messrs. Atchison, Badger, Bell, Benton, Berrien, Borland, Bright, Butler, Calhoun, Cameron, Davis of Mississippi, Dickinson, Douglas, Downs, Fitzgerald, Foote, Hannegan, Houston, Hunter, Johnson of Maryland, Johnson of Louisiana, Johnson of Georgia, King, Lewis, Mangum, Mason, Metcalf, Pearce, Sebastian, Spruance of Delaware, Sturgeon, Turney, and Underwood. Total, 33.

NAYS — Messrs. Allen, Atherton, Baldwin, Bradbury, Breese, Clarke, Corwin, Davis of Massachusetts, Dayton, Dix, Dodge, Felch, Green, Hale, Hamblin, Miller, Niles, Phelps, Upham, Walker, and Webster. Total, 21.

In Mr. Webster's speech "for the Constitution and the Union," March 7, 1850, there was no surrender of his opposition to the extension of slavery. While he declared that if a proposition were before Congress to establish a government for New Mexico, and it was moved to insert a provision for a prohibition of slavery, he would not vote for it, giving as a reason that "such prohibition would be idle as it respects any effect it would have upon the territory, and he would not take pains uselessly to reaffirm an ordinance of nature, nor to reenact the will of God," — he caused extracts from his speeches in 1837 and 1847 to be read as evidence of his uniform opinions, and added :

"Sir, wherever there is a substantive good to be done, wherever there is a foot of land to be prevented from becoming slave territory, I am ready to assert the principle of the exclusion of slavery. I am pledged to it from the year 1837 ; I have been pledged to it again and again ; and I will perform those pledges ; but I will not do a thing unnecessarily that wounds the feelings of others, or that does discredit to my own understanding."

It is in the face of this declaration that it has been impudently said that the compromise measure of 1850 repealed the Missouri Compromise. One extract more, and that on his reception at Buffalo in 1851.

"I never would consent, and never have consented, that there should be one foot of slave territory beyond what the old thirteen States had at the time of the formation of the Union. Never! never!"

Mr. Clay also was opposed to the further extension of slavery. In the debates of 1850 he is reported to have said :

"I am extremely sorry to hear the senator from Mississippi say that he requires, first, the extension of the Missouri Compromise line to the Pacific, and also that he is not satisfied with that, but requires, if I understood him correctly, a positive provision for the admission of slavery south of that line. And now, sir, coming from a slave State, as I do, I owe it to myself, I owe it to truth, I owe it to the subject, to say that no earthly power could induce me to vote for a specific measure for the introduction of slavery where it had not before existed, either south or north of that line. Coming, as I do, from a slave State, it is my solemn, deliberate, and well-matured determination, that no power, no earthly power, shall compel me to vote for the positive introduction of slavery either south or north of that line.

\* \* \* \* \*

"But if, unhappily, we should be involved in war, between the two parts of this confederacy, in which the effort upon the one side should be to restrain the introduction of slavery into the new Territories, and upon the other side to force its introduction there, what a spectacle should we present to the astonishment of mankind, in an effort, not to propagate rights, but, I must say it, though I trust it will be understood to be said with no design to excite feeling, — a war to propagate wrongs in the Territories thus acquired from Mexico. It would be a war in which we should have no sympathies, — no good wishes; in which all mankind would be against us; in which our own history itself would be against us; for, from the commencement of the Revolution down to the present time, we have constantly reproached our British ancestors for the introduction of slavery into this country."

These extracts show the Whig faith in relation to the extension of slavery, into which I have been baptized; and with this creed before me, I may well believe that Whigs who are willing that slavery should be farther extended, are following after strange political gods.

But the argument to show that the opposition of the Republican party to the extension of slavery is not fanatical or sectional; but that it is for the preservation, thus far, of equal rights on the part of all the people in the national representation; and that it is therefore a constitutional measure; may be extended much beyond the proof that it has heretofore had the support of the Whig party and its most eminent leaders.

The representation in the House of Representatives is politically unequal. The representation of the non-slaveholding States is based upon free population;—that of the slaveholding States upon free population, with the addition of a further representation of three fifths of their slaves; which they insist are property. The slaveholding States have *twenty-one* members, by reason of their slave representation. This is clearly not an equality of representation. If the slaves are persons, entitled to be represented as such, there is no reason for this discrimination. If they are regarded as property, there is just as much reason for a representation founded on the laboring animals which aid in performing the work upon a farm in a non-slaveholding State.

That the slave is not a person who is represented in the national government, is very obvious. He never votes. It may be answered that the women and children of the non-

slave-holding States do not vote ; which is very true. But the women rear and train those who are one day to exercise the right of suffrage, and the children are coming forward as the compeers or successors of those who do exercise it. Both classes are therefore directly interested in its exercise, and form a part of the constituency of the representative. They are represented, and free population is therefore a suitable basis on which to apportion a representation. Not so with the slave. He is not a part of the constituency. No age qualifies him, no property, if there be a property qualification, ever entitles him to any participation in the elective franchise. The nurture and training of those who are to exercise it, and which is to qualify them for its exercise, is not committed to him. Slaves may minister to the mere physical wants of those who do, and those who are to exercise this franchise, but they do not imbue their minds with free principles and high aspirations. They are in no way an element of a free government. The representation, then, so far as they are concerned, is the representation of the master ; and it is founded upon property. It is not to be denied that property *may* form the basis of representation. It has been contended that as it pays the greater portion of the taxes, it furnishes a suitable and proper basis of representation, to some extent. It was so contended in the Convention to revise the Constitution of this Commonwealth in 1820. But the question returns ;—viewed as property, why should three fifths of this peculiar species of property furnish a basis of representation, while all other property is entirely excluded ? The solution of this question will be found in the history of the Constitution, and that of the period which immediately preceded its formation.

So far as this representation is constitutional, it has its

existence in the second section of the first article of the Constitution, in these words, — "Representation and direct taxes shall be apportioned among the several States, which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons." The reason why this should be the rule is certainly not apparent, but a short investigation will solve the mystery.

Bills of credit were first resorted to as a means for carrying on the war of the Revolution, but it soon became apparent that the credit of the bills must be sustained by means for their redemption. On the 26th December, 1775, Congress resolved that the thirteen Colonies be pledged for their redemption, — "that each Colony provide ways and means to sink its proportion in such manner as will be most effectual and best adapted to the condition, circumstances, and equal mode of levying taxes in each; and that the proportion or quota of each respective Colony be determined according to the number of inhabitants of all ages, including negroes and mulattoes, in each."

The Committee which reported the articles of Confederation in July, 1776, inserted a similar provision, with an exception of Indians not paying taxes. Upon this a debate arose. Mr. Chase moved that the quotas should be fixed by the number of white inhabitants. He admitted that taxation should be always in proportion to property; that this was in theory the true rule, but that from a variety of difficulties it could never be adopted in practice. He considered the number of inhabitants a tolerably good criterion of property, and



that this might always be obtained, and was the best mode with one exception only. He observed that "negroes are property, and as such could not be distinguished from the lands or personalties held in those States where there are few slaves; that the surplus of profit which a northern farmer is able to lay by he invests in cattle, horses, &c., whereas a southern farmer lays out the same surplus in slaves; that there was no more reason, therefore, for taxing the Southern States on the farmer's head and on his slave's head, than the Northern ones on their farmers' heads and the heads of cattle; that the mode proposed would therefore tax the Southern States according to their numbers and their wealth conjunctly, while the Northern would be taxed on numbers only; *that negroes in fact should not be considered as members of the State more than cattle, and that they have no more interest in it.*"

Fellow-citizens, please bear in mind that you have here, very fully stated, the slave-holding view of the relation of slaves to the State, showing, conclusively, that they are not represented, and form no part of the basis of an apportionment of representation, unless the basis adopted be property. It does not follow, however, that they are not, as property, just subjects of taxation.

Mr. John Adams observed that the numbers of people were taken by the article as an index of the wealth of the State, and not as subjects of taxation; — that five hundred freemen produced no greater surplus for the payment of taxes than five hundred slaves; — therefore the State in which are the laborers called freemen should be taxed no more than that in which are those called slaves.

Mr. Harrison proposed, *as a compromise, that two slaves*

*should be counted as one freeman. He affirmed that slaves did not do as much work as freemen, and doubled if two effected more than one.*

Mr. Wilson said that other kinds of property were pretty equally distributed through all the Colonies; there were as many cattle, horses, and sheep in the North as the South, and South as the North, but not so as to slaves; that experience has shown that those Colonies have been always able to pay most which have the most inhabitants, whether they be black or white; and the practice of the Southern Colonies has always been to make every farmer pay poll-taxes on his laborers, whether they be black or white. He acknowledged that freemen worked the most, but they consumed the most also, and did not produce a greater surplus for taxation. The slave was neither fed nor clothed so expensively as a freeman.

Dr. Witherspoon was of opinion that the value of lands and houses was the best estimate of the wealth of a nation, and that it was practicable to obtain such a valuation. He said the cases stated by Mr. Wilson were not parallel; that in the Southern Colonies slaves pervade the whole Colony; but they do not pervade the whole continent; and that the original resolution of Congress to proportion the quotas according to souls, was temporary only, and related to the moneys before emitted; whereas they were then entering into a new compact, and stood on original ground.

The amendment of Mr. Chase was rejected, five States for, six against it, and one divided.

The rule suggested by Dr. Witherspoon was afterwards substituted for that reported by the Committee, but the final ratification of the articles did not take place until March, 1781. In the mean time, Congress apportioned various sums

to be raised by each State, with a proviso that the sums required should not be considered the proportion of any one State, but should be placed to their credit, and interest allowed until the quota should be finally adjusted by Congress, agreeably to the rule inserted in the articles of Confederation.

This rule was found to be impracticable. In 1778 Congress required the States to make a return of the houses and lands. New Hampshire alone complied; and in 1783 Congress adopted a new article on the subject, to be proposed to the States, providing that the quotas of the several States should be supplied "in proportion to the whole number of white and other free citizens and inhabitants of every age, sex, and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes in each State."

Eleven States had assented to the change at the time of the formation of the Constitution, and we have here substantially the provision which was afterwards inserted in that instrument as the basis of representation, as well as of taxation. In an address to the States, recommending the adoption of this and other articles of amendment, it was said that the only material difficulty which attended the change of the rule, in the deliberation of Congress, was to fix the proper difference between the labor and industry of free inhabitants and all other inhabitants; and that the ratio ultimately agreed on was the effect of mutual concession. The concession seems to have been in rating the value of the labor of five slaves, the same as that of three freemen; not quite two to one, according to Mr. Harrison's proposition.

The inquiry naturally arises, why three fifths of the slaves,

which had been introduced into the basis of taxation because slaves were taken as an index of the wealth and ability of the masters to contribute and pay, should also be made the basis of a representation founded on population, when they are not represented, and have no part or lot in that matter? The answer is, that this was the result of *another compromise*.

The mode to be adopted in voting under the Confederation was the subject of great debate in Congress. The article adopted was in these words: "In determining questions in the United States in Congress assembled, each State shall have one vote." The larger States contended strenuously for a representation according to numbers.

Mr. Wilson thought that taxation should be in proportion to wealth, but that representation should accord with the number of freemen; that government is a collection of the wills of all; that if any government could speak the will of all, it would be perfect; and that so far as it departs from this, it becomes imperfect.

But the small States carried their point.

In the Convention for the formation of the Constitution, the different subjects were first discussed on resolutions; afterwards on reports of Committees to which different propositions were referred; and then upon a draft of a Constitution reported by the Committee of Detail. In this mode, and in incidental discussions when other parts of the Constitution were under consideration, the subject of representation was many times before the Convention, and in different connections. The plan of a National Government introduced by Mr. Randolph of Virginia, with the concurrence of his colleagues, asserted that the right of suffrage ought to be

proportioned to the quotas of contribution, or to the number of free inhabitants, as the one or the other rule might seem best in different cases. On taking it up for consideration in Committee, after propositions to amend so as to adopt the one or the other of those modes, Mr. Madison moved that an equitable ratio ought to be substituted for the equality established by the articles of Confederation; but the matter was postponed on the suggestion that the Deputies from Delaware were restrained by their commission from assenting to any change. It was feared "that the large States would crush the small ones whenever they stand in the way of their ambitious views."

It was suggested, in answer, that all the existing boundaries might be erased, and a new partition of the whole be made into thirteen equal parts.

Mr. Sherman proposed, that the proportion of suffrage in the first branch should be according to the respective numbers of free inhabitants, and that in the second branch, or Senate, each State should have one vote. Dr. Franklin thought, that the numbers of representatives should bear some proportion to the represented, although he proposed proportionate supplies and an equal number of delegates from each State, the decisions to be by a majority of votes. Quotas of contribution and actual contributions of the States were proposed, and the debate was terminated at that time by the adoption in Committee of the proportion substantially as it stands at present in the Constitution; that "being the rule in the Act of Congress, agreed to by eleven States for apportioning quotas of revenue on the States." Mr. Gerry thought property not the rule of representation. Why, then, should the blacks, who were property in the South, be

in the rule of representation more than the cattle and horses of the North?—Nine States voted in favor of it; New Jersey and Delaware in the negative.

The subject was debated at length afterwards, when the representation in the Senate;—when the proportion of the representation in the first Congress under the Constitution;—and when the periodical census were, at different times, under consideration.

Gen. Pinckney dwelt on the superior wealth of the Southern States, and insisted on its having its due weight in the government. Mr. Gouverneur Morris said property ought to have its weight, but not all the weight. If the Southern States were to supply money, the Northern States were to spill their blood. Besides, the probable revenue to be expected from the Southern States had been greatly overrated. Delegates from South Carolina insisted that blacks be included in the representation equally with the whites, and moved that three fifths be struck out. It was answered that when the rule of taxation was fixed by Congress, delegates representing slave States urged that the blacks were still more inferior to freemen. To which it was replied that the Eastern States then contended for their equality. Mr King thought the admission of the blacks along with the whites at all, would excite great discontent among the States having no slaves.

Mr. Wilson did not well see on what principle the admission of blacks in the proportion of three fifths could be explained. If admitted as citizens, why not on an equality with white citizens? If as property, why is not other property admitted? These were difficulties, however, which he thought must be overruled by the necessity of compromise.

A special Committee made a report of an apportionment,

with a clause authorizing the legislature to regulate future apportionments according to the principle of wealth and numbers; and to this Gouverneur Morris moved a proviso, that taxation should be in proportion to representation. This was amended so as to read *direct* taxation. The debate was then continued upon the representation. Mr. Davie saw, that it was meant by some gentlemen to deprive the Southern States of any share of representation for their blacks. He was sure North Carolina would not confederate on any terms that did not rate them at least as three fifths. Dr. Johnson was for including blacks equally with the whites in the computation. Gouverneur Morris believed Pennsylvania would never agree upon a representation of negroes. Mr. Pinckney moved an amendment so as to make blacks equal to whites in the ratio. He said they were as productive of pecuniary resources as the laborers of the Northern States: and it would be *politic with regard to the Northern States, as taxation is to keep pace with representation*. The taxation clause was then incorporated into the clause respecting representation. Mr. Pinckney's motion for equality was rejected, two to eight, and the whole proposition adopted, six to two, Massachusetts and South Carolina divided.

The debate was continued upon the proposition for an equality of votes in the Senate. Mr. Madison said: "It seemed to be now pretty well understood that the real difference of interests lay not between the large and the small, but between the Northern and Southern States. The institution of slavery and its consequences formed the line of discrimination."

The Committee of Detail having reported a draft of the proposed Constitution, with a provision that no duties should be laid on exports, nor on the migration or importation of

such persons as the several States might think proper to admit, nor prohibit such importations; the opposition to the slave representation was renewed. When the clause respecting representation was considered, Mr. King said he never could agree to let slaves be imported without limitation, and then be represented in the national legislature. Either slaves should not be represented, or exports should be taxable. Mr. Gouverneur Morris moved to insert the word "free" before the word "inhabitants." Much, he said, would depend on this point. He denounced slavery as a nefarious institution, and the slave-trade as a defiance of the most sacred laws of humanity; and he inquired, "What is the proposed compensation to the Northern States for a sacrifice of every principle of right, every impulse of humanity?" "Let it not be said," he remarked, "that direct taxation is to be proportioned to representation. It is idle to suppose that the General Government can stretch its hand directly into the pockets of the people scattered over so vast a country. They can only do it through the medium of exports, imports, and excises."

Mr. Dayton seconded the motion.

Mr. Sherman "did not regard the admission of negroes as liable to such insuperable objection. It was *the freemen of the Southern States who were to be represented, according to the taxes paid by them, and the negroes are only included in the estimate of the taxes.*"

Mr. Wilson thought the motion premature. An agreement to the clause under consideration would be no bar to the object of it; and it was rejected, New Jersey alone voting for it.

Subsequently, Mr. Dickinson moved to limit the number of representatives to be allowed to the large States. Unless this were done, the small States would be reduced to entire



insignificance, and encouragement given to the importation of slaves. And when the clause of the draft providing that no duties should be laid on the importation of slaves, nor the importation prohibited, came up, the increase of the inequality in the representation by means of the slave-trade, if the three fifths clause was allowed, was not overlooked. Mr. Luther Martin (of Maryland) proposed to allow a prohibition or tax on the importation of slaves. "In the first place," he said, "as five slaves are to be counted as three freemen in the apportionment of representation, such a clause would leave an encouragement to this traffic. In the second place, slaves weakened one part of the Union, which the other parts were bound to protect; the privilege of importing them was therefore unreasonable. And in the third place, it was inconsistent with the principles of the Revolution, and dishonorable to the American character, to have such a feature in the Constitution."

Delegates from North Carolina, South Carolina, and Georgia insisted, that those States would never agree to the plan unless their right to import slaves was untouched. Some of them intimated that if they were let alone, they would probably of themselves stop importations. Mr. Rutledge said, if the Northern States consult their interest, they will not oppose the increase of slaves, which will increase the commodities of which they will become carriers.

The subject was referred to a committee, which reported a clause restraining any prohibition of migration or importation prior to 1800, and that a tax or duty might be imposed upon such migration or importation, at a rate not exceeding the average of the duties laid on imports. Upon motion of General Pinckney, opposed by Mr. Madison, the first part of the report was amended so as to extend the term to 1808;

and the second part of it was then amended so that the tax or duty should not exceed ten dollars. Mr. Sherman was against this second part, as acknowledging men to be property, by taxing them as such under the character of slaves. Mr. King and Mr. Langdon considered this as the price of the first part, and General Pinckney admitted that it was so. Virginia was decidedly in favor of an immediate restriction.

I have thus presented an extended, and yet very limited, sketch of the debates and proceedings, that you may see how the slave-holding States relieved themselves, in the Congress of the Confederation, from taxation, (or what was in the nature of taxation,) on account of their slaves, by transferring the basis from population to that of real estate; and how, when the latter basis failed, by reason of a neglect to make returns, and there was a report of a committee in favor substantially of the former basis,—by proposing that two slaves should be counted as one freeman, and alleging that the labor of slaves was not of as much value as that of freemen by about that ratio, they succeeded in reducing the slave portion of the basis of taxation to three fifths, by a compromise;—how, in the Convention which formed the Constitution, by insisting that there should be a representation on account of slaves, because wealth or property was a proper subject of representation, and alleging that the labor of a slave was of the value or nearly the value of that of a freeman, they succeeded in obtaining a representation on three fifths of their slaves, by another compromise, upon which, direct taxation and representation were to go together, the taxation being the equivalent or consideration, mainly, which was to satisfy the non-slave-holding States for the inequality; and how, afterwards, by insisting on an unre-

stricted right to import slaves, threatening something like secession or disunion if that demand was not acceded to, they obtained a provision prohibiting restriction for twenty years, subject to a duty, by another compromise.

The slave-holding portion of the basis of representation was evidently very distasteful to some of the members, even sugar-coated as it was by taxation on the same basis; and it was undoubtedly rendered somewhat more palatable by the insertion of the provision by which Congress might prohibit the importation of slaves after 1808, and thus far restrain the extension of the inequality, while at the same time it prevented a further "defiance of the most sacred laws of humanity."

In the Convention of Massachusetts for the ratification of the Constitution, Mr. King, explaining the section respecting representation, is reported to have said, "It is a principle of this Constitution that representation and taxation should go hand in hand. This paragraph states that the number of free persons, including those bound to service for a term of years, and including Indians not taxed, three fifths of all other persons. These persons are the slaves. By this rule are representation and taxation to be apportioned. And it was adopted because it was the language of all America." And to make the idea of taxation by numbers more intelligible, he said, "five negro children of South Carolina are to pay as much tax as the three governors of New Hampshire, Massachusetts, and Connecticut." Another member (Mr. Nasson) wished "the honorable gentleman had considered this question on the other side, as it would then appear that this State will pay as great a tax for three children in the cradle, as any of the Southern States will for five hearty working negro men."

In answer to a suggestion that Congress may draw their revenue wholly by direct taxes, it was said, "They cannot be induced to do so; it is easier for them to have resort to the impost and excise; but it will not do to overburden the impost, because that would promote smuggling, and be dangerous to the revenue; therefore Congress should have the power of applying, in extraordinary cases, to direct taxation."

One of the speakers in the Convention at Boston, is reported to have said:—

"There is another matter concerning which we hear a great deal in these days of excitement,—and, allow me to say, a great deal which, in my judgment, is mischievous. Men who have accustomed themselves to speak without reverence to the Constitution of their country, which no man who is fit for a Republican can, are constantly attempting to make us believe that the provision of the Constitution which determines the representation in the House of Representatives, is a grant of enhanced power to the slave States over that which is accorded in the council of the nation to the free States. And those repeated attempts are not always in vain, and there are many good men and true who really believe it. Now, what is the provision concerning which all this hue and cry is made, and on account of the existence of which these designing men are endeavoring to make us believe that the Constitution has established an oligarchy in the South? Here it is:

"Representatives and direct taxes shall be apportioned among the several States which may be included within the Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons."

"This is the whole provision, and many men having this alone presented to them, think that the addition to the enumeration of three fifths of the slaves, is a grant of increased power to the slave State. But he who will examine the whole of the Constitution, in all those parts which have reference to representation from the several States, will see that, instead of being a grant, it is a limitation of power.

"Strike this 'obnoxious' provision out, and see what would be the effect of that insane proceeding. The immediate and the only effect would be,

that the slave States would be entitled to and would have more representatives than they now have, while the free States would have less than they now have. Is that what these philanthropic gentlemen want?

"The Constitution provides, — and I suppose that we shall all agree that it ought to provide, — that representation should be based upon population. Strike out the 'oligarchical provision,' as I have heard it called, and the enumeration in the slave States would include not only three fifths, but the whole of the slave population.'

On reading this, I was very much at a loss to understand wherein the misrepresentation consisted, and how, if the provision cited were struck out, the Constitution would provide that representation should be based upon population. A friend suggested that the meaning must be, that if that part of the provision which gives the representation for three fifths of the slaves, which is the "obnoxious" or "oligarchical provision," were struck out, such would be the result. But that would not give a representation upon the whole number of slaves, for in that case the numbers upon which the representation is to be apportioned, would be determined by the whole number of free persons, including those bound to service, and excluding Indians not taxed. If the whole clause respecting the mode in which the numbers are to be determined was struck out, the Constitution would be a different thing from what it is, — which would be true, in fact, if you strike out the whole, or any substantial part, of the provision. What it would have been, if not what it is, no one can say. It is very clear, however, from the debates, that it would not have contained a clause by which the whole number of slaves would be included in the ratio of representation. The position, therefore, that an increased representation, and an unequal representation, is granted to the slave States, seems not to be impeached by this argument.

I need not say to you that, under this provision of the Constitution, taxation and representation have not gone "hand in hand,"—no substantial equivalent having been received for the inequality of the representation. The clause, so far as respects representation, has been always active and operative, and the inequality is constantly increasing ; but as it regards taxation it has been almost a dead letter, quite so for more than a third of a century, there having been no direct taxation during that time.

Whether the basis be regarded as one founded upon population, or property, there is an inequality which is contrary to the spirit of our free institutions.

The inequality exists also in the election of President and Vice-President. At the coming election, the slave-holding States will have twenty-one electoral votes, by reason of their slave population ; the Constitution providing that "each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the State may be entitled in the Congress." But for this unequal vote, Mr. Buchanan's chance would be the mere shadow of a shade.

But this inequality is not a subject of complaint, with any view to redress or change. The people of the non-slave-holding States ratified the Constitution, with these provisions as parts of it. If they made a bad compromise, it is no more than they have done in other instances. Let it stand. Let those entitled have the benefit of it ; but it is proper that these matters should be brought into view, when the account of the wrongs and injustice done to the slave-holding States is audited for the purpose of ascertaining the balance. There is no design on the part of the Republican party, so far as I

am aware, to attempt an escape from the due operation of these constitutional provisions.

But the inquiry arises, What is the extent and limit of this constitutional provision authorizing a representation based upon three fifths of the slave population? This is a question upon which I proceed to speak, and but for which I should not be here.

The question is, whether all the States now in the Union, and those which may be admitted hereafter, are entitled by this constitutional provision to a representation based upon three fifths of their slaves? or whether, in its legitimate operation, it is confined to States formed out of territory embraced within the limits of the United States at the time the Constitution was adopted? If the latter, then two of the twenty-one representatives from the slave-holding States, who have their seats upon that part of the basis, are not there in pursuance of the Constitution, but upon some other foundation; and any other States which may hereafter be formed from the territory acquired or annexed since the adoption of the Constitution, will not be entitled to this unequal representation, even if they are slave States. If this be true, two electoral votes, which will probably be cast in the pending election, (one in Louisiana, derived entirely from her slave population, and one in Missouri, derived from her slave population, and a fraction of the free population too small to have given her a representative, but for the aid of the slave basis,) will be cast by reason of the unequal and wrongful representation from those States; and will be, therefore, of themselves, so far as they may affect the election, a political injustice. And if all this be so, then the Republican oppo-

sition to the extension of slavery, as the most effectual way of preventing further injustice, which it may not be easy to escape if the extension is permitted, is neither sectional nor fanatical, but is founded upon the Constitution itself.

There is something in the history of the debates upon the Constitution, which might tend to show that this provision might have been confined to those States which were in existence when the Constitution was formed, through a power to annex a condition to the admission of any new slave State by which it should be entitled to representation upon its free population alone. A provision reported by the Committee of Detail, in connection with the clause authorizing the admission of new States, in these words, "If the admission be consented to, the new State shall be admitted on the same terms with the original States," was struck out by nine votes to two, for the reason expressed, that circumstances might arise which would render it inconvenient to admit new States on terms of equality, and that the legislature should be left free.

It is not necessary, however, that I should now rely upon that, in order to sustain my position. I am willing to concede, for the sake of the argument, that this provision respecting representation embraces all States which might lawfully be included in the Union, in pursuance of the provisions of the Constitution, as understood by the framers of it, and construed by those best qualified to determine its scope and meaning; and more than this cannot be required. It would be subversive of the first principles of law to extend the compromise respecting representation beyond the constitutional limits for the admission of States into the Union. For instance, suppose the Constitution had provided that the States mentioned in it, with Vermont and the five States to



be formed north-west of the Ohio, might be included in the Union, but that no State should be divided, and that no other State should be admitted; then the provision respecting representation would regulate the proportion of all the States which might thus be included, but could not lawfully and fairly be construed to extend farther. And if, contrary to the supposed provision respecting the admission of States, a foreign State should be admitted into the Union by a major vote of Congress, or by treaty, or in any other way except an amendment of the Constitution, the State so admitted would not be within the constitutional provision respecting representation, but must depend for her representation in the national councils upon some other authority than the Constitution.

We come, then, to the question, What States might be admitted into the Union, as formed by the Constitution, under and according to the provisions of that instrument?

Although Rhode Island refused to send delegates to the Convention, the Constitution made provision for her as if she had been represented. The original thirteen States, therefore, were entitled to membership, and the ratification of nine of them was sufficient for its establishment among the States so ratifying. The third section of the fourth article is in these words:—

“New States may be admitted by the Congress into the Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned, as well as of the Congress.”

It may be said that this language is broad enough to include the admission of all the globe; but it is quite clear that

such could not have been the intent of those who framed or of those who adopted it; and the well-settled rule of construction, applicable to organic as well as other laws, is, that in determining the meaning, the context, subject-matter, spirit, and reason of the law, are to be taken into consideration. New States may be admitted. What new States? We understand from other parts of the Constitution, that a State, to be admitted, must have a republican form of government. Here is one qualification of the general terms not contained in the section itself. If we turn to the introductory clause or preamble of the Constitution, we find not only by whom, but for what purposes, the Constitution was framed. "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." This looks very much like another qualification. The United States then existed as a nation, with limits defined by the treaty of peace. It was not established to form a more perfect union with the inhabitants of Great Britain, or those of any other foreign State and their posterity; and if not, the provision for admission is not broad enough to embrace them. All those for whom it was framed may be included. Those for whom it was not framed are not within the clause of admission. The argument, however, does not rest on that alone. Fortunately the means for determining this question are accessible; but the inquiry may embrace a few facts in the previous history of the country. When the colonial charters were granted, the knowledge of the geography of this country was very limited, and perhaps there were other reasons for the extent of some

of the grants. Connecticut, Carolina, and Georgia extended west to the South Sea, and Virginia extended from sea to sea west and north-west. Upon the Declaration of Independence, the new States claimed according to the colonial charters. The treaty of peace was made with "the United States" in 1783, and specified their boundaries, the westerly line being the middle of the Mississippi; and of course the limits of the States on that side were defined by that boundary. Nearly all the country west of the mountains was at that time a wilderness, and the land in possession of the Indians, but the several States claimed the portion of it which was within their charter limits. Other States having no vacant lands, insisted that these uninhabited lands, having been acquired by the common means and common expenditure of blood and treasure, ought to belong to all, and be applied to the discharge of the debt incurred by the war. Maryland declined to ratify the Articles of Confederation for a long period, the principal reason being that the lands were not thus appropriated. In 1780, New York passed an act which was completed in March, 1781, by a formal instrument executed by her delegates in Congress, defining her limits, and ceding to the use and benefit of such States as should become parties to the Confederation, all her claims northward and westward of those limits.

In 1783, Virginia authorized a conveyance to the United States in Congress assembled of all her right to the territory northwest of the Ohio, which was perfected in 1784, by a transfer of all her right, title, and claim, as well of soil as of jurisdiction. With the exception of certain lands reserved, this cession was to the same uses as that of New York. The act contained a condition that the territory so ceded should be formed into States containing a suitable extent of terri-

tory, not less than one hundred, nor more than one hundred and fifty miles square, or as near thereto as circumstances will admit; and that the States so formed shall be distinct republican States, and admitted members of the Federal Union, having the same rights of sovereignty, freedom, and independence as the other States."

In 1785, Massachusetts made a cession of certain of her claims. And in 1786, Connecticut did likewise.

At the time of the formation of the Constitution, Vermont was desirous of admission into the Union, which was opposed by New York, on account of her claim to the territory claimed by Vermont.

As early as 1782 a petition from Kentucky asserted the right of Congress to create new States, and prayed that the power might be asserted in their behalf; and some measures had been taken by Virginia with a view to the erection of a separate State west of the mountains.

There had been a petition likewise from inhabitants of Western Pennsylvania, complaining of grievances, and praying that Congress would give a sanction to their independence, and admit them into the Union.

The people of the District of Maine had contemplated a separate government; and the erection of another in Western North Carolina was foreseen.

It was under these circumstances that the question came up in the Convention, what provision should be made in the Constitution relative to the admission of new States.

The 10th article of the plan proposed by Mr. Randolph was a resolution, "that provision ought to be made for the admission of States *lawfully arising within the limits of the United States*, whether from a voluntary junction of territory

or otherwise, with the consent of a number of voices in the National Legislature less than the whole."

This resolution was agreed to, and was afterwards incorporated into a report of a Committee on Resolutions. The report, with this resolution in the same words, was afterwards referred to the Committee of Detail.

Thus far this matter had formed the subject of little or no debate.

In the course of the discussions upon representation, "Mr. Gerry wished before the question should be put that the attention of the House might be turned to the dangers apprehended from Western States. He was for admitting them on liberal terms, but not for putting ourselves into their hands. They will, if they acquire power, like all men, abuse it. They will oppress commerce, and drain our wealth into the Western country. To guard against these consequences, he thought it necessary to limit the number of new States to be admitted into the Union, in such a manner that they should never be able to outnumber the Atlantic States." He accordingly moved, "that in order to secure the liberties of the States already confederated, the number of Representatives in the first branch, of the States which shall hereafter be established, shall never exceed in number the Representatives from such of the States as shall accede to this Confederation."

Mr. King seconded the motion. Mr. Sherman thought there was no probability that the number of future States would exceed that of the existing States. If the event should ever happen, it was too remote to be taken into consideration at that time. Besides, we are providing for our posterity, for our children and our grandchildren, who would

be as likely to be citizens of new Western States as of the old States. On this consideration alone, we ought to make no such discrimination as was proposed by the motion."

In the Report of the Committee of Detail, the plan as matured at that time was introduced in these words, namely:—"We the people of the States of New Hampshire, Massachusetts, &c. (reciting the names of the thirteen States) do ordain, declare, and establish the following Constitution for the government of ourselves and our posterity."

The 17th article of the plan was:—"New States, lawfully constituted or established *within the limits of the United States*, may be admitted by the legislature into this government; but to such admission the consent of two thirds of the members present in each House shall be necessary. If a new State shall arise within the limits of any of the present States, the consent of the legislatures of such States shall also be necessary to its admission. If the admission be consented to, the new States shall be admitted on the same terms with the original States. But the legislature may make conditions with the new States concerning the public debt which shall then be subsisting."

When this article was taken up for consideration, a long debate arose, and divers amendments were proposed.

Mr. Gouverneur Morris moved to strike out the last two sentences, namely:—"If the admission be consented to, the new States shall be admitted on the same terms with the original States. But the legislature may make conditions with the new States concerning the public debt which shall be then subsisting." He did not wish to bind down the legislature to admit Western States on the terms here stated.

Mr. Madison opposed the motion, insisting that the Western States neither would nor ought to submit to a union

which degraded them from an equal rank with the other States.

Col. Mason. If it were possible by just means to prevent emigration to *the Western country*, it might be good policy; but go the people will, as they find it for their interest; and the best policy is to treat them with that equality which will make them friends and not enemies.

Mr. Gouverneur Morris did not mean to discourage the growth of the Western country. He knew that to be impossible. He did not wish, however, to throw power into their hands.

Mr. Sherman was for fixing an equality of privileges.

Mr. Langdon was in favor of the motion. He did not know but circumstances might arise which would render it inconvenient to admit new States on terms of equality.

Mr. Williamson was for leaving the legislature free. The existing *small* States enjoy an equality now, and for *that* reason are admitted to it in the Senate. This reason is not applicable to new Western States.

On Mr. Gouverneur Morris's motion for striking out, New Hampshire, Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, North Carolina, South Carolina, and Georgia aye,—nine; Maryland and Virginia no,—two.

After Mr. Morris's amendment striking out the provision for equality had prevailed, he moved as a substitute for the residue of the article, "New States may be admitted by the legislature into the Union; but no new State shall be erected within the limits of any of the present States, without the consent of the legislature of such State, as well as the general legislature." The first part to "Union," was agreed to *nem. con.* Mr. L. Martin opposed the latter part. "Nothing," he said, "would so alarm the limited States, as to make the

consent of the larger States, claiming the Western lands, necessary to the establishment of new States within their limits." The motion was agreed to, six to five. The article coming before the House as amended, Mr. Sherman thought it unnecessary. The Union could not dismember a State without its consent.

Dr. Johnson suggested, that as the clause stood, Vermont would be subjected to New York, contrary to the faith pledged by Congress.

Mr. Sherman moved to postpone, to take up this amendment, and moved as an amendment, "The legislature shall have power to admit other States into the Union; and new States to be formed by the division or junction of States now in the Union, with the consent of the legislature of such States." Mr. Madison adds, [*"The first part was meant for Vermont, to secure its admission,"*] which shows clearly that the general language used did not refer to foreign territory; as is shown in fact by the whole of the debate.

Mr. Gouverneur Morris's substitute, after being amended, was agreed to, 8 to 3, — New Jersey, Delaware, Maryland in the negative.

An amendment by Mr. Dickinson was adopted without count, and the article was thus framed substantially as it now stands in Art. IV. sect. 3 of the Constitution, "Congress" being substituted for "legislature," with some change in the arrangement of the sentence.

In all this long debate, and among the various propositions to amend, I find nothing indicating a supposition on the part of any member, that provision was to be made for the admission of a State formed from territory not then within the limits of the United States. The general clause providing that new States may be admitted into the Union, passed, as



we have seen, without dissent, which it could not have done had there been a supposition that it contemplated the possibility of the addition of foreign territory. That was intended to provide for the admission of Vermont, and perhaps to cover the admission of the States to be formed from the territory northwest of the Ohio, although it would seem to have been understood that the ordinance adopted by Congress July 13, 1787, (about six weeks prior to these proceedings in the Convention,) had settled the affairs of that territory by a fundamental law and compact, so that no provision in the Constitution was necessary in reference to that territory. The residue of the article related to cases of new States to be formed from the territory of the existing States, by division, and perhaps by the junction of parts of States,—a main part of the controversy being, whether Congress should have power to do this without the consent of the States to be affected. No mention was made of Canada, for whose admission into the Confederation provision was made in the Articles of Confederation. It was quite proper to give her an opportunity to join in the Revolution. As she had not done so, the Constitution was not made for her.

It appears that the provision for the admission of new States, extended only to the territory then embraced in the United States; not only from the preamble, but because it was framed with reference to the existing state of things; because all its language is satisfied without extending it to foreign territory: because it would have been regarded as

show conclusively that no foreign territory was within the contemplation of the Convention, — and it is believed that no suggestion of a construction which would include such territory, is to be found in the debates in the State conventions; and because any provision for admitting foreign territory would have been fatal to the Constitution. No one conversant with the history of the Constitution can doubt it. The jealousy of the Western States which were to be admitted shows this.

But this is not all upon this point. The construction of the Constitution nearest to a contemporaneous one; clearly held the provision not to extend to foreign territory.

Upon the adoption of the Constitution, the settlement of the Western country was more rapid, and the importance of the navigation of the Mississippi became more and more apparent.

An arrangement was had with Spain respecting the navigation through her territory, and for a deposit of merchandise at New Orleans.

Difficulties, and jealousy, and excitement arose, and there was a proclamation by the Intendant at New Orleans, that the right of deposit no longer existed; whether with or without the direction of his government is now immaterial.

Spain about that time ceded Louisiana to France by the treaty of St. Ildefonso, and a negotiation was opened with France for the purchase of the Island of Orleans and the territory eastward.

Mr. Madison then Secretary of State sent to Mr. Livingston

with the citizens of the United States on an equal footing, being a provision which cannot now be made, it is to be expected from the character and policy of the United States that such incorporation will take place without unnecessary delay. In the mean time they shall be secure in their persons and property, and in the enjoyment of their religion."

While this matter was under consideration, the danger of a war between France and England became imminent; and Bonaparte, probably convinced that he could not hold Louisiana if war was declared, proposed to sell the whole of it, and no less.

Mr. Livingston, and Mr. Monroe who joined him about that time, were not authorized to make such a purchase. But the matter admitted of no delay; an answer to the proposition must be given forthwith; and they took the responsibility, and negotiated a treaty, April 30, 1803, for the purchase, which contained this as its third article, namely:—

" Art. 3. The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess."

The article, it is perceived, is somewhat more definite than that contained in Mr. Madison's draft of a treaty for the smaller cession. It is not, perhaps, to be inferred with certainty from the article prepared by Mr. Madison, that he entertained a decided opinion that Louisiana could not be admitted into the Union as a State without an amendment of the Constitution; but upon the conclusion of the treaty, Mr. Jefferson's opinion to that effect was distinctly ex-

pressed. In a letter to Wilson C. Nicholas, Sept. 7, 1803, he said : —

“ Whatever Congress shall think it necessary to do, should be done with as little debate as possible, and particularly so far as respects the constitutional difficulty. I am aware of the force of the observations you make on the power given by the Constitution to Congress, to admit new States into the Union, without restraining the subject to the territory then constituting the United States. But when I consider that the limits of the United States are precisely fixed by the treaty of 1783, that the Constitution expressly declares itself to be made for the United States, I cannot help believing the intention was not to permit Congress to admit into the Union new States, which should be formed out of the territory for which, and under whose authority alone, they were then acting. I do not believe it was meant that they might receive England, Ireland, Holland, &c. into it, which would be the case on your construction. When an instrument admits two constructions, the one safe, the other dangerous, the one precise, the other indefinite, I prefer that which is safe and precise. I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a construction which would make our powers boundless. Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction. I say the same as to the opinion of those who consider the grant of the treaty-making power as boundless. If it is, then we have no Constitution. If it has bounds, they can be no others than the definitions of the powers which that instrument gives. It specifies and delineates the operations permitted to the federal government, and gives all the powers necessary to carry these into execution. . . . I confess, then, I think it important, in the present case, to set an example against broad construction, by appealing for new power to the people. If, however, our friends shall think differently, certainly I shall acquiesce with satisfaction ; confiding, that the good sense of our country will correct the evil of construction when it shall produce ill effects.”

Other letters written by him are to the same effect.

The treaty was ratified by the Senate, at a special session of Congress, Oct. 20, 1803. The ratification was in executive session, and I have found no sketch of the debate. The

subject came before the Senate soon after, on a bill to authorize a creation of stock, for the purpose of carrying the treaty into effect. A few extracts from that debate will show the opinion upon this subject.

Mr. Pickering said : —

" Neither the President and Senate, nor the President and Congress, are competent to such an act of incorporation. He believed that our administration admitted that this incorporation could not be effected without an amendment of the Constitution; and he conceived that this necessary amendment could not be made in the ordinary mode by the concurrence of two thirds of both Houses of Congress, and the ratification by the legislatures of three fourths of the several States. He believed the assent of each individual State to be necessary for the admission of a foreign country as an associate in the Union; in like manner as in a commercial house, the consent of each member would be necessary to admit a new partner into the company; and whether the assent of every State to such an indispensable amendment were attainable, was uncertain."

Mr. Tracy : —

" Congress have no power to admit new foreign States into the Union, without the consent of the old partners. The article of the Constitution, if any person will take the trouble to examine it, refers to domestic States only, and not at all to foreign States; and it is unreasonable to suppose that Congress should, by a majority only, admit new foreign States, and swallow up, by it, the old partners, when two thirds of all the members are made requisite for the least alteration in the Constitution. The words of the Constitution are completely satisfied, by a construction which shall include only the admission of domestic States, who were all parties to the Revolutionary war, and to the compact; and the spirit of the association seems to embrace no other. . . .

" But it is said, that this third article of the treaty only promises an introduction of the inhabitants of Louisiana into this Union, as soon as the principles of the federal government will admit; and that, if it is unconstitutional, it is void; and, in that case, we ought to carry into effect the constitutional part. . . .

"I shall be asked, sir, what can be done? To this question I have two answers; one is, that nothing unconstitutional can or ought to be done; and if it be ever so desirable that we acquire foreign States, and the navigation of the Mississippi, &c., no excuse can be formed for violating the Constitution; and if all those desirable effects cannot take place without violating it, they must be given up. But another and more satisfactory answer can be given. I have no doubt but we can obtain territory either by conquest or compact, and hold it, even all Louisiana, and a thousand times more if you please, without violating the Constitution. We can hold territory; but to admit the inhabitants into the Union, to make citizens of them, and States, by treaty, we cannot constitutionally do; and no subsequent act of legislation, or even ordinary amendment to our Constitution, can legalize such measures. If done at all, they must be done by universal consent of all the States or partners to our political association. And this universal consent, I am positive, can never be obtained to such a pernicious measure as the admission of Louisiana, of a world, and such a world, into our Union. This would be absorbing the Northern States, and rendering them as insignificant in the Union as they ought to be, if, by their own consent, the measure should be adopted."

Mr. John Quincy Adams:—

"For my own part, I am free to confess that the third article, and more especially the seventh, contain engagements placing us in a dilemma, from which I see no possible mode of extricating ourselves but by an amendment, or rather an addition to the Constitution. The gentleman from Connecticut (Mr. Tracy), both on a former occasion, and in this day's debate, appears to me to have shown this to demonstration. But what is this more than saying that the President and Senate have bound the nation to engagements which require the coöperation of more extensive powers than theirs, to carry them into execution? Nothing is more common in the negotiations between nation and nation, than for a minister to agree to and sign articles beyond the extent of his powers. This is what your ministers, in the very case before you, have confessedly done. It is well known that their powers did not authorize them to conclude this treaty; but they acted for the benefit of their country; and this House, by a large majority, has advised to the ratification of their proceedings."

Mr. Taylor, of North Carolina, who was in favor of the treaty, said :—

“The territory is ceded by the first article of the treaty. It will no longer be denied that the United States may constitutionally acquire territory. The third article declares that ‘the inhabitants of the ceded territory shall be incorporated in the Union of the United States.’ And these words are said to require the territory to be erected into a State. This they do not express, and the words are literally satisfied by incorporating them into the Union as a territory, and not as a State. The Constitution recognizes, and the practice warrants, an incorporation of a territory and its inhabitants into the Union, without admitting either as a State.”

Mr. Breckenridge, of Kentucky, who also supported the treaty :—

“But if gentlemen are not satisfied with any of the expositions which have been given of the third article of the treaty, is there not one way, at least, by which this territory can be held? Cannot the Constitution be so amended, (if it should be necessary,) as to embrace this territory? If the authority to acquire foreign territory be not included in the treaty-making power, it remains with the people; and in that way all the doubts and difficulties of gentlemen may be completely removed; and that, too, without affording France the smallest ground of exception to the literal execution on our part of that article of the treaty.”

Mr. Wilson C. Nicholas, of Virginia, to whom the letter of Mr. Jefferson was addressed, did not venture, against the opinion there expressed, to contend that Louisiana could be admitted as a State, without an amendment of the Constitution. He said :—

“If, as some gentlemen suppose, Congress possesses this power, they are free to exercise it in the manner that they may think most conducive to the public good. If it can only be done by an amendment to the Constitution, it is a matter of discretion with the States whether they will do it or not;

for it cannot be done 'according to the principles of the federal Constitution,' if the Congress or the States are deprived of that discretion which is given to the first, and secured to the last by the Constitution. In the third section of the fourth article of the Constitution, it is said, 'new States may be admitted by the Congress into this Union.' If Congress have the power, it is derived from this source; for there are no other words in the Constitution that can, by any construction that can be given to them, be considered as conveying this power. If Congress have not this power, the constitutional mode would be by an amendment to the Constitution."

The treaty had been the subject of a debate in the House, a few days before. The constitutional right to acquire territory by purchase, was more strenuously questioned in the House than in the Senate. The right to admit territory, if acquired, was also denied.

Mr. Griswold, of New York, said:—

"It was not consistent with the spirit of the Constitution that territory other than that attached to the United States at the time of the adoption of the Constitution should be admitted; because at that time the persons who formed the Constitution of the United States had a particular respect to the then subsisting territory. They carried their ideas to the time when there might be an extended population; but they did not carry them forward to the time when addition might be made to the Union of a territory equal to the whole United States, which additional territory might overbalance the existing territory, and thereby the rights of the present citizens of the United States be swallowed up and lost. Such a measure could not be consistent either with the spirit or the genius of the government."

Mr. Griswold, of Connecticut:—

"The government of the United States was not formed for the purpose of distributing its principles and advantages to foreign nations. It was formed with the sole view of securing those blessings to ourselves and our posterity. It follows from these principles that no power can reside in any



public functionary to contract any engagement, or to pursue any measure, which shall change the Union of the States. . . .

"A new territory and new subjects may undoubtedly be obtained by conquest and by purchase; but neither the conquest nor the purchase can incorporate them into the Union. They must remain in the condition of colonies, and be governed accordingly. The objection to the third article is not that the province of Louisiana could not have been purchased, but that neither this nor any other foreign nation can be incorporated into the Union by treaty or by law; and as this country has been ceded to the United States only under the condition of an incorporation, it results that, if the condition is unconstitutional or impossible, the cession itself falls to the ground."

On the other hand, Mr. Smilie, of Pennsylvania, after citing the article, added:—

"Now, where is the difficulty? We are obliged to admit the inhabitants according to the principles of the Constitution. Suppose those principles forbid their admission; then we are not obliged to admit them. This followed as an absolute consequence from the premises. There existed, however, a remedy for this case, if it should occur: for, if the prevailing opinion shall be, that the inhabitants of the ceded territory cannot be admitted under the Constitution as it now stands, the people of the United States can, if they see fit, apply a remedy, by amending the Constitution so as to authorize their admission. And if they do not choose to do this, the inhabitants may remain in a colonial state."

Mr. Nicholson, of Maryland:—

"Whether the United States, as a sovereign and independent empire, had a right to acquire territory, was one question, but whether they could admit that territory into the Union, upon an equal footing with the other States, was a question of a very different nature. Upon this latter point, he meant to offer no opinion, because he did not consider it before the House. When the subject should come properly into discussion, he should have no objection not only to enter at large into the constitutional authority to admit the newly acquired territory into the Union as a State, but likewise to inquire whether this was really the spirit and intention of the third article of the treaty? The question now before the committee was, Is it expedient to carry this treaty into effect?"

Mr. Rodney, of Delaware :—

“How are these people to be admitted? According to the principles of the federal Constitution. Is it an open violation of any part of the Constitution? No. An express reservation is made by those who formed the treaty, that they must be admitted under the Constitution. Now, if admitted agreeably to the Constitution, it cannot be said to be in violation of it, and if not in violation of it, the fears of gentlemen are groundless.”

Mr. John Randolph :—

“A stipulation to incorporate the ceded country does not imply that we are bound ever to admit them to the unqualified enjoyment of the privileges of citizenship. It is a covenant to incorporate them into our Union—not on the footing of the original States, or of States created under the Constitution—but to extend to them, according to the principles of the Constitution, the rights and immunities of citizens, being those rights and immunities of jury trial, liberty of conscience, &c., which every citizen may challenge, whether he be a citizen of an individual State, or of a territory subordinate to and dependent on those States in their corporate capacity. In the mean time they are to be protected in the enjoyment of their existing rights. There is no stipulation, however, that they shall ever be formed into one or more States.”

I have thus cited that part of the debates upon this subject in the Senate and House which bears directly upon this question, for the purpose of showing, that while the right to admit a State formed out of foreign territory was emphatically denied, no one attempted to controvert those arguments by asserting the existence of a constitutional power; but the argument was evaded by contending that the third article of the treaty did not stipulate for any admission as a State. It is true that it may be inferred, from the remarks of one or two of the friends of the administration, that personally they were ready to assert that the territory acquired

could be admitted, but the argument was suffered to go by default.

Upon the question, very much discussed in the preceding debate, whether the United States possessed a constitutional power to acquire territory by purchase, permit me to say that I have no doubt that such a power exists in certain cases as an incident to the powers expressly granted. The right to make war may involve a right of conquest as an incident. It does not follow that the subject-matter of the conquest is to become one of the States of the Union. Nor is it by any means to be concluded, that because the United States may acquire territory by conquest, they may acquire it by purchase in any and every case and for every purpose. The United States have no right to purchase territory merely for sale again. But the purchase may be made as an incident to the power to regulate commerce, embracing the power to provide for the necessities of commerce. On this principle, the arrangement with Spain was lawful; and a purchase for the purpose of the free navigation of the river, and for a place of deposit and transshipment, was within the just constitutional powers of the government. If this could not be effected without the purchase of the whole of Louisiana, I do not doubt the right to acquire that territory, and then to sell any part of it which was not necessary for the purpose for which it was required, or to retain it as a territory. But all that is far from proving a right on the part of Congress to admit any portion of it as a State.

Along with the right to acquire territory is the right to govern it. I shall not detain you with an argument to show this. It results as a necessity almost; as a right, certainly, proved upon sound principles, and shown by a uniform prac-

tice of this government up to the present time; not even abandoned at the present day.

Nor shall I stop to show that the stipulation in the treaty, that the inhabitants of the ceded territory should be incorporated into the Union, had no relation to those parts of the territory in which at the time there were no civilized inhabitants, and gave no rights to their future inhabitants. France had no intention and could have no desire to provide for the comfort and security of persons who, half a century afterwards, should emigrate from the States and settle in the unsettled portion of the country which she ceded. It was very clearly shown in the debate in 1803 that the treaty-making power could not stipulate for the admission of a State, so as to require its admission. But if it could, the third article of the treaty did not extend to the "howling wilderness," nor does the fact that slaves then existed in Louisiana show any right now to hold them in Kansas.

The question whether a State formed out of territory acquired since the adoption of the Constitution, could be admitted by Congress, came before that body again in 1810-11, on the application of Louisiana for admission. — Notwithstanding the opinions of Mr. Jefferson and others, the dominant party did not see fit to propose an amendment of the Constitution.

The success of the application was a foregone conclusion, but the minority were not willing to yield a constitutional principle without an attempt to maintain it; and the friends of the measure were therefore compelled to contend for the power. The attempt to maintain the doctrine even at that late day, and under such circumstances, is to have its full weight. Unfortunately for the argument, however, the rea-

sons given tend either to prove nothing, or to prove the converse of the proposition which they are adduced to support.

Mr. Rhea, of Tennessee : —

“ We have been told by that gentleman that though States may be admitted into the Union, no territory which did not belong to the original States can be admitted to be a State. I, said Mr. R., do solemnly protest against this doctrine, and do deny its constitutionality. It is with States as with individuals; if an individual, the head of a family, purchases a farm adjoining that on which he lives and resides, and probably (?) acquires all the right and title thereto, will any one deny it to be his? Will any one say that he has not power to incorporate it with his former farm, so that both shall be one, or in other words, that purchased with the other shall be but one? It is believed no one will say so. The purchaser, Sir, can do more; he can place his son or sons thereon, and although so placed, and out of their father's house, they will remain belonging to the family. The United States, a sovereign, have power to purchase adjacent territory.”

The Honorable gentleman failed to remember that the owner of a farm is not created by a written constitution for certain limited purposes.

Mr. Gholson, of Virginia : —

“ In this delegation of power I can perceive nothing to warrant the inference that it is confined to such territory only as the United States then possessed, or that it excludes the incorporation into the Union of subsequent acquisitions. Indeed this is altogether a novel doctrine, and all the interpretations of the Constitution have been contrary to it. Upon examination, I presume it would prove too much even for its advocate. For if the construction insisted on would exclude Orleans from the Union, it would likewise exclude the Mississippi Territory, since the latter as well as the former was acquired by the United States posterior to the adoption of the Constitution; and the gentleman has not applied his doctrine to the Mississippi Territory; nor will it, I imagine, be attempted to be shown that the Mississippi is to be

shut out of the Union, contrary to our engagements to Georgia, when she ceded to the United States that territory."

But Georgia was within the limits of the United States, and the territory ceded by her therefore not foreign territory.

Mr. R. M. Johnson, of Kentucky, after reciting the third article of the treaty : —

"We are thus solemnly bound by compact to admit this Territory into the Union as a State, as soon as possible, consistent with the Constitution of the United States. What principle of the Constitution will be violated by their admission into the Union as a State? In fact, we are bound by the principles of the Constitution; we are bound to the people of the United States; we are bound by conscience, and we are bound by a still more sacred tie to Him who gave us independence, to extend the blessings of liberty to these people whenever it is practicable."

Mr. Macon, as cited by Mr. Quincy, said : —

"If this article had not territories without the limits of the old United States to act upon, it would be wholly without meaning. Because the ordinance of the old Congress had secured the right to the States within the old United States, and a provision for that object, in the new Constitution, was wholly unnecessary."

Mr. Bibb cited the first part of the clause, "New States may be admitted into the Union," and said there was a general power granted, and what followed showed two limitations upon it, and, according to his rule, "the expression of these two excluded all idea of any other." — Whereas, in truth, the limitations applying solely to territory within the United States, show the scope and intent of the general clause to which they are attached. If that had been in-

tended to be universal, there would probably have been some limitations without as well as within.

Mr. Poindexter, delegate from Mississippi, argued that other territory than that belonging to the United States at the time of the adoption might be admitted, because it had been the constant practice to annex Indian territory to the old States, and to form new States of lands purchased from different tribes of Indians in the United States,—alleging that they were foreign powers; not considering that the statement itself showed that the lands were within the United States, and that the political doctrine is that the Indians have only a usufructuary right.

Mr. Wright, of Maryland, urged that Vermont was not a member of the Confederation, nor of the Convention; that she therefore was not one of the United States; was foreign as to them, and she had been admitted, and correctly so, for a long period; forgetting to remember that the territory was claimed by New York, and some of it by New Hampshire, and that it was within the limits of the United States, as defined by the treaty of peace. He contended further, that as the admission of Canada into the Confederation was provided for in the Articles, it could not be doubted that she might be received as a new State by becoming independent, or by purchase; whereas, as has been already suggested, the reason why, after the peace, Canada should have been intentionally excluded from any admission, is quite apparent.

Mr. Wheaton of Massachusetts, and Mr. Gold of New York, denied the right to admit. And Mr. Quincy, who now, at a patriarchal age, contends for constitutional freedom with the vigor and ardor of youth, made a most eloquent argument against the admission, in the introductory part of which he

uttered the memorable declaration, the latter part of which, slightly changed, furnished for a long period, a sort of political war-cry for his opponents : —

“ I am compelled to declare it as my deliberate opinion, that, if this bill passes, the bonds of this Union are virtually dissolved ; that the States which compose it are free from their moral obligations, and that, as it will be the right of all, so it will be the duty of some, to prepare definitely for a separation — amicably if they can, violently if they must.”

I should not do justice to the subject, if some further extracts from that speech were not presented : —

“ I think it may be made satisfactorily to appear not only that the terms ‘ new States ’ in this article did mean political sovereignties to be formed within the original limits of the United States, as has just been shown, but, also, negatively, that it did not intend new political sovereignties, with territorial annexations, to be created without those original limits. This appears first from the very tenor of the article. All its limitations have respect to the creation of States, within the original limits. Two States shall not be joined ; no new State shall be erected, within the jurisdiction of any other State, without the consent of the legislatures of the States concerned, as well as of Congress. Now, had foreign territories been contemplated, had the new habits, customs, manners, and language of other nations been in the idea of the framers of this Constitution, would not some limitation have been devised, to guard against the abuse of a power, in its nature so enormous, and so obviously, when it occurred, calculated to excite just jealousy among the States, whose relative weight would be so essentially affected by such an infusion at once of a mass of foreigners into their Councils, and into all the rights of the country ? The want of all limitation of such power would be a strong evidence, were others wanting, that the powers, now about to be exercised, never entered into the imagination of those thoughtful and prescient men, who constructed the fabric. But there is another most powerful argument against the extension of this article to embrace the right to create States without the original limits of the United States, deducible from the utter silence of all debates at the period of the adoption of the Federal



Constitution, touching the power here proposed to be usurped. If ever there was a time, in which the ingenuity of the greatest men of an age was taxed to find arguments in favor of and against any political measure, it was at the time of the adoption of this Constitution. All the faculties of the human mind were, on the one side and the other, put upon their utmost stretch, to find the real and imaginary blessings or evils likely to result from the proposed measure. Now I call upon the advocates of this bill to point out, in all the debates of that period, in any one publication, in any one newspaper of those times, a single intimation, by friend or foe to the Constitution, approving or censuring it for containing the power, here proposed to be usurped, or a single suggestion that it might be extended to such an object as is now proposed. I do not say that no such suggestion was ever made. But this I will say, that I do not believe there is such an one anywhere to be found. Certain I am, I have never been able to meet the shadow of such a suggestion, and I have made no inconsiderable research upon the point. Such may exist—but until it be produced, we have a right to reason as though it had no existence.”

“But there is an argument, stronger even than all those which have been produced, to be drawn from the nature of the power here proposed to be exercised. Is it possible that such a power, if it had been intended to be given by the people, should be left dependent upon the effect of general expressions; and such, too, as were obviously applicable to another subject; to a particular exigency contemplated at the time? Sir, what is this power we propose now to usurp? Nothing less than a power changing all the proportion of the weight and influence possessed by the potent sovereignties composing this Union. A stranger is to be introduced to an equal share, without their consent. Upon a principle, pretended to be deduced from the Constitution, this Government, after this bill passes, may and will multiply foreign partners in power, at its own mere motion; at its irresponsible pleasure; in other words, as local interests, party passions, or ambitious views may suggest. It is a power, that, from its nature, never could be delegated; never was delegated; and as it breaks down all the proportions of power guarantied by the Constitution to the States, upon which their essential security depends, utterly annihilates the moral force of this political contract.”

In the year 1832, Mr. John Quincy Adams addressed a

letter to Mr. Speaker Stevenson, which was published in the National Intelligencer. Some portions of it relate particularly to this subject. Brief paragraphs follow : —

“ Had I been present, I should have voted in favor of the ratification. I had no doubt of the power to conclude the treaty. I did vote and speak in favor of the bill making appropriations for carrying the treaties into execution. . . .

“ But I voted against the bill ‘ to enable the President of the United States to take possession of the territories ceded by France to the United States, by the treaty concluded at Paris on the 30th April last, and for the temporary government thereof.’ (See Biorens’s United States Laws, Vol. III. p. 562, both those Acts.) My speech on the bill authorizing the creation of the stock, may be found in the Fourth Volume of Elliot’s Debates and Illustrations of the Federal Constitution, p. 258 ; and it points out the distinction upon which I voted for one of those bills, and against the others. . . .

“ I believed an amendment of the Constitution indispensably necessary to legalize the transaction ; and I further believed the free and formal suffrages of the people of Louisiana themselves were as necessary for their annexation to the Union, as those of the people of the United States. I made a draft of an article of amendment to the Constitution, authorizing Congress to annex to the Union the inhabitants of any purchased territory ; and of a joint resolution directing that the people of Louisiana might meet in primary assemblies, and vote upon the question of their own union with the United States. Of both these experiments, had Mr. Jefferson had the courage to make them, the result was as certain as the diurnal movement of the sun. But Mr. Jefferson did not dare to make them. He found Congress mounted to the pitch of passing those acts, without inquiring where they acquired their authority ; and he conquered his own scruples as they had done with theirs. . . .

“ The administration, and its friends in Congress, had determined to assume and exercise all the powers of government in Louisiana, and all the powers for annexing it to the Union, without asking questions about their authority. . . .

“ A letter from Mr. Jefferson to Dr. Sibley has been recently published, written June, 1803, after he had received the Louisiana treaties, in which he clearly and unequivocally expresses the opinion that an amendment to

the Constitution would be necessary in order to carry them into full execution. Yet, without any such amendment to the Constitution, Mr. Jefferson did, as President of the United States, sign all those acts for the government and taxation of the people of Louisiana, and did exercise all the powers vested in him by them." . . . .

And last, though not least, Mr. Webster's opinion that the true construction of the Constitution did not authorize the admission of States formed from foreign territory, is clearly expressed in his speech on the exclusion of slavery from the territories ; and, I think, in others of his speeches.

I claim thus to have shown you ;—by the course of the debates at the time the Constitution was formed, and afterwards ;—by argument ;—and by the opinions of eminent men ;—that the original and true construction of the clause contained in it, giving power for the admission of new States, did not authorize the admission of States formed from foreign territory ; and that Louisiana, therefore, was admitted by an act of sovereign power, under color of the Constitution, but not in pursuance of its provisions. — But she is in the Union, and I trust will long remain there. She cannot be put out, nor go out, except by a great political convulsion. Congress could admit, as we see, because Congress did admit ; but Congress does some other things without a constitutional warrant. That admission, like those other things, once done, cannot be recalled ; and, therefore, *as to the fact of admission itself*, it is the same as if a constitutional authority existed. And so of other States admitted since, and coming within the principle.

But it is by no means true that all the results should follow, the same as if the admission were constitutional. The admission is to be judged of by itself, and not by the constitutional rules which it has violated.

Suppose, instead of the conclusion that Louisiana was admitted by an act of sovereign power, it should be conceded that she was admitted, not without constitutional warrant, but by virtue of a construction of the third section of the fourth article. That is shown not to have been the original meaning nor the original construction, and therefore not the true construction; and such new construction of that article does not enlarge the compromise provision in relation to the representation. The States thus admitted are admitted on such terms as Congress shall prescribe under the new construction, so those terms do not violate the equal rights of others; and especially the equal right of representation, to which the other States of the Union are entitled, except so far as equality has been surrendered by the true construction of the clause respecting representation. — In other words, the enlargement of the clause respecting admission, by construction, and not by the act of the people, does not enlarge the compromise in the clause of representation, nor the application of that clause to cases for which it was not intended.

But it may be said that Louisiana and other new States are entitled to the advantage of this slave representation by virtue of their acts of admission, (that of Louisiana providing, that the State “shall be one, and is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever.”) In fact a doctrine has recently been broadly asserted which goes still farther, and denies that Congress has a right to attach an exclusion of slavery to the admission of a State; alleging that if Congress admits a State, it must be admitted on an equal footing with other States, and that the whole question of slavery, so far as the States are

concerned, is a local question and the subject of purely local law. It was said in the Convention at Boston :—

“The government of the United States has no power either to make or to unmake State Constitutions. Gentlemen seem to forget that the government of the United States is a government with limited and defined powers—and that this whole question of slavery is, so far as the States are concerned, a local question and the subject of purely local law. If Congress admit a State at all, it must admit it on an equal footing with the other States. The power of Congress to admit a State is the power to admit just such States as the existing States are. The power to admit at all is acquired from an explicit provision of the Constitution, and the word State in that provision means, and can only mean, just what the word State means wherever it occurs in the same instrument.

“To admit a community which should not possess the same degree of sovereignty as is possessed by the people of the existing States, would not be to admit a State—it would be the admission of something else than a State. But Congress may refuse to admit. Of course she may. And these logicians without logic say if she may refuse to admit she may surely admit with conditions. Now, sir, certainly with *some* conditions—but those conditions must be in regard to subjects concerning which the Constitution shall have conferred upon Congress power in reference to the existing States of the Union.”

Upon this I remark, first, that the opinion of Mr. Webster, to whose opinions the speaker has been supposed heretofore to have paid some deference, is distinctly shown to have been the other way in his speech on the admission of Texas, in 1845; in that on the exclusion of slavery, in 1848; and in other speeches. He could have had no doubt that a condition annexed, that slavery should be excluded, would be valid.

But I will not rely upon authority alone to controvert this proposition.

The deed of cession by Virginia of the territory northwest

of the Ohio, required that the territory ceded should be laid out and formed into States containing a suitable extent of territory, &c., "and that the States so formed should be distinct republican States, and *admitted members of the Federal Union, having the same rights of sovereignty, freedom, and independence as the other States.*" It was completed, I think, in March, 1784.

It is stated in a paper read by Governor Coles before the Historical Society of Pennsylvania, in June last, that a few days after the deed of cession, at the instance of Mr. Jefferson a committee was raised, consisting of Thomas Jefferson of Va., Samuel Chase of Maryland, and David Howell of Rhode Island, for the purpose of organizing and providing for the government of the territory. Mr. Jefferson, as chairman of the committee, made a report, now to be seen in the archives of Congress, in the Department of State at Washington. It provided, "that the territory ceded, or to be ceded by individual States to the United States, 'shall be formed into distinct States,' the names of which were given and the boundaries defined; and the divisions thus made contemplated and embraced all the western territory lying between the Florida and Canada lines. That is, it included the territory which had been 'ceded' to the northwest of the Ohio River, and that 'to be ceded' to the southwest of that river, or elsewhere, by individual States to the United States." There was a proviso, that both the Territorial and State Governments should be established on a basis, the fifth article of which was, that after 1800 there should be neither slavery nor involuntary servitude in any of said States, otherwise than in the punishment of crimes, &c. On the 19th of April, on motion of Mr. Spaight of North Carolina, this article was struck out. There were six States in favor of the article, three against it, and one

divided ; but it required two thirds of the ten States voting to adopt it. This plan of government, as thus amended, was adopted April 2d, 1784, but no organization appears to have been had under it.

In March, 1785, Mr. King of Massachusetts moved a similar provision, which was committed to a committee, but what further action was taken upon it does not appear.

In July, 1786, Congress recommended to Virginia, to revise her act of cession so as to empower Congress to divide the territories into not more than five, nor less than three "distinct republican States," which should thereafter "*become members of the Federal Union, and have the same rights of sovereignty, freedom, and independence, as the original States.*"

Before this was done by Virginia, Congress adopted the immortal Ordinance of July 13th, 1787, and in anticipation of the consent of Virginia, inserted in the 5th article, a provision that there should be formed in the Territory, not less than three, nor more than five States, the boundaries of which should become fixed and established as soon as Virginia should alter her act of cession. And the 6th article prohibited slavery, with a proviso by which a fugitive slave might be reclaimed. This Ordinance passed unanimously.

On the 30th of December, 1788, Virginia passed an act, which, after stating, by way of preamble, the recommendation of Congress ; and setting forth the passage of the Ordinance of 1787 ; recited, ratified, and confirmed the fifth article of the Ordinance ; — thus complying with the recommendation.

Now, it seems quite clear, that neither Virginia nor Congress supposed that the prohibition of slavery rendered the States to be formed under the restriction, inferior to the other States ; or in any way deprived them of "the same rights of sovereignty, freedom, and independence, as the other

States," which they were to have by the deed of cession, and by the act of Congress requesting an alteration of it. The only change was in limiting the number of States and establishing certain boundaries.

The several acts admitting the States northwest of the Ohio, like the act respecting Louisiana, admit them "into the Union upon an equal footing with the original States, in all respects whatsoever." And yet slavery is for ever prohibited there.

A prohibition of slavery, then, does not deprive a State of its equality with the other States.

The six free States in the Northwest, will learn with some surprise probably, that they hold any degraded rank in the Union. Until the shining of the light which has recently burst forth from the darkness of slavery, no one had a surmise that they were not in the Union upon "an equal footing with the original States."

Again;—the admission of Louisiana was clogged with divers "fundamental conditions." It is admitted that Congress may annex "*some* conditions." Why not a condition restricting slavery? What is there in this condition that renders it improper above all others? Nothing! Nothing whatever. On the contrary, it seems to be just the thing respecting which, a condition should be imposed because of the difference of situation of the different States in that respect, and the inequality of the representation. As some of them are already prohibited from having slaves, they may well insist that if others are admitted it shall be with the same prohibition which rests on them. And what they may insist on, other States are at equal liberty to contend and vote for.

But still further. The article authorizing Congress to admit new States, does not prescribe the terms on which they



shall be admitted. There is nothing, then, against the annexation of any condition which Congress pleases to attach. Any condition, therefore, which is not in conflict with the great principles of the republic, is admissible; and slavery, thank God! is not yet one of those principles. The debate, and the action of the Constitutional Convention, striking out the restriction which had been reported, show that Congress was intentionally left free to impose conditions upon the admission of the new States within the contemplation of the article; and that this was designed to extend even to a restriction upon equal representation in Congress, if the case should appear to require it. Virginia provided against the exercise of this power of Congress to restrict slavery, in the case of Kentucky, by her act of consent. And so did North Carolina, in relation to Tennessee. It is quite clear, then, that when new States are formed out of territory not within the United States at that time, the admission may be upon any terms which Congress sees fit to annex, if they are consistent with the existence of a republican government. If the admission is by an act of sovereign power not warranted by the Constitution, the act of power will of itself determine the limits of its exercise. If it be by a new construction of a constitutional article, such construction may authorize an exercise of the power upon any limitations or conditions, provided they are not in contradiction to the express terms of the article, or to the rest of the instrument, so as to make the Constitution at variance with itself.

It may be asked,—“If the Constitution does not confer upon Louisiana and Missouri a right to a representation on account of their slaves; and if the admission of a State upon terms of equality does not give a right to hold slaves, and have such a representation; how is it that those States have now,

each a representative upon the slave basis? The answer is, that they have such representation by the last apportionment act. Congress has seen fit to place them in the same condition as if they were within the constitutional provision. And as the House is the judge of its own elections, they are secure of it until the next apportionment. In fact, so long as the apportionment stands, the House, it may be said, is bound to recognize the right to the representation that it gives. Congress has admitted the State. The thing is done and the admission stands. It cannot be repealed. Congress has apportioned the representation, and it stands according to the apportionment until terminated.

Those States having had a representation founded on the slave basis, may be unwilling to part with it hereafter ; and I, for one, am quite content that they shall retain it, *upon a compromise* that there shall be no farther extension of slavery ; provided the compromise may be one which shall not be *compromised* over again.

The argument which I have thus stated respecting the constitutional right to admit new States, is of no practical value so far as it regards the admission of the territories now belonging to the United States. Their admission is a political necessity ; and, moreover, the power has been so often exercised, that the further exertion of it in respect to the territories now acquired, may be said to be settled by construction. But it may serve to show that no other territories ought to be acquired for the purpose of admission. — It may serve to show that the territories now existing, even if admitted with slavery, will not be entitled to a representation upon the slave basis. — It may serve to show, that if a State should be

admitted under a restriction of slavery, and should afterwards change her constitution so as to admit slavery, (which some of the people of Illinois once attempted,) she would not thereupon be entitled to a slave representation through a violation of her obligations. — It may serve to show that there is no constitutional objection to a restriction of slavery as the condition of the admission of a State, as the very best means of preventing further inequalities in the representation. — And it may serve to show that the Republican party is not a fanatical party, and that their platform is not a sectional platform.

The hosts which throng upon that platform and cluster around it, are inspired by the same devotion to civil liberty and equal rights which immortalized the fathers in the days of the Revolution. — The pillars of fire which go before those hosts on their onward march, are the pillars of the Constitution. — The thunder which rolls in the light cloud over their heads, and in its reverberations from the Atlantic and the Pacific, — from the Gulf of Mexico and the British Provinces, echoes back, "NO FARTHER EXTENSION OF SLAVERY!" is good, sound, constitutional, Whig thunder. — The forked lightning which plays along the line of their advance, is the electricity of free principles. — And the blazonry of their banners is, "VICTORY FOR FREEDOM!"

## N O T E .

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**PERSONAL:**—As the newspapers say when they announce that somebody is about to eat his dinner and lodge at a tavern.

As these sheets were passing through the press, I read in a speech of Hon. Robert C. Winthrop, delivered in Faneuil Hall, October 24th, the following:—

“They charge upon our candidate the earliest suggestion of resistance to the will of the people, the earliest qualification of the modern Republican doctrine of passive submission to the powers that be,—not choosing to remember that from the very same lips by which an off-hand and misconstrued remark of Mr. Fillmore has been most severely criticized and condemned, there had previously fallen the distinct and deliberate declaration, that ‘some of his father’s blood was shed on Bunker Hill at the commencement of one Revolution, and that there is a little more of the same sort left, if it shall prove that need be, for the beginning of another.’ These were the well remembered words, as lately as the 2d of June last, of that learned head of the neighboring Law School, who has felt called upon within a few weeks to quit his official chair, and compromise the neutrality of his position, in order to arraign Mr. Fillmore for having counselled resistance to authority; and who availed himself of the same opportunity, if the newspaper reports are correct, to question the propriety, and ridicule the position of Mr. Winthrop and Mr. Hillard, at the late Whig Convention. I shall not follow his example further than to say, that I would be greatly relieved, as a friend to the University and the Law School, if I could have as clear a perception of the propriety of his course, as I have of that of my friend Mr. Hillard or even of my own.”—*Boston Courier*, Oct. 25th.

The “well remembered words” thus repeated, form part of the closing sentence of a speech made by me respecting the infamous as-

sault of Brooks upon Senator Sumner. I like them best in the connection in which they were originally placed, and therefore restore them to the context, quoting a few of the words which preceded them.

"But this is not all. The felon blow which struck down the citizen and the Senator, prostrated at the same time the privileges of the Senate and the freedom of debate guarantied by the Constitution of the United States. It was vengeance for the free expression of unpalatable opinions, and designed to deter others from the exercise of their constitutional rights; and it is but the last of a series of outrages similar in character though not in degree, which have made the city of Washington a bear garden, and the capitol little better than a den of wild beasts.

"It is this blow to freedom of speech and constitutional privileges which gives this act a painful significance, above that of any mere private assault upon a citizen, or even upon one of those appointed to represent the interests of a sovereign State in the Congress of the United States. It is this prostration of constitutional liberty which has called us here at this time, and it is this which demands of us, and of all others who respect the law, and possess a love of liberty, a careful, deliberate, unimpassioned consideration of the consequences to which such occurrences will lead if their repetition is permitted."

\* \* \* \* \*

"But notwithstanding all such demonstrations of approbation, it is not to be assumed that this atrocious deed will be characterized as chivalrous, and its miserable perpetrator be hailed as a gallant son of the South, by any beyond the halls of Congress, except a few choice spirits who should rank below the bully and the blackguard. It is by no means to be concluded, as yet, that it will be sustained by high-minded men of honorable standing in the Southern States. And until that is made apparent it is not to be treated as the act of the South."

\* \* \* \* \*

"In the mean time, however, with nothing of threat, and nothing of offence, let it be made to appear in all constitutional modes, that these assemblages of the people are not matter of form; that they are not formal protests; that they are not mere expressions of indignation, however deep; but that they are to be taken as the exponents of an unalterable and unconquerable determination to assert and maintain the supremacy of the law; free thought and free speech; freedom of debate and immunity therefor; at whatever cost and at all hazards.

"Let it be understood that the government of the United States must protect the delegates who assemble in her halls of legislation, and not suffer them to be struck down on the very spot where they are entitled to privilege, and immunity, and

absolute safety. Let it be assured that no representative of Massachusetts, — that no representative of any State in the Union, — is to be deterred by violence 'from espousing whatever opinions he may choose to espouse, from debating whenever he may see fit to debate, or from speaking whatever he may see fit to say on the floor of the Senate.' Let it be remembered that there are other forms of oppression more odious than a colonial government and a Boston Port Bill, bad as they were. The stamp act and the tea tax convulsed the civilized world. But taxation, even without representation, is but as the small dust of the balance, when compared with the constitutional right of freedom of debate, within the limits of parliamentary law, in the halls of legislation.

"For myself, personally, I am, perhaps, known to most of you as a peaceable citizen, reasonably conservative, devotedly attached to the Constitution, and much too far advanced in life for gasconade; but, under present circumstances, I may be pardoned for saying that some of my father's blood was shed on Bunker Hill, at the commencement of one revolution, and that there is a little more of the same sort left, if it shall prove that need be, for the beginning of another."

I am not willing to suppose that no difference has been perceived between this expression of opinion, that, When freedom of debate in the halls of legislation is suppressed by violence, and the government utterly fails of being a free representative government, the time will have arrived for a revolution, which shall restore it to its former purity, — and that declaration of Mr. Fillmore, substantially, that, The election of the candidate of one party, according to all constitutional modes and forms, will cause a dissolution of the Union, and should be regarded as furnishing a justification for such a result. — Mr. John M. Botts, a citizen of a Southern State, said of the allegation, that Mr. Fillmore had made such a declaration, that it was a libel upon him, and that if Mr. Fillmore had said it, he would be the last man in the United States that would vote for him. A citizen of a Northern State admits that he so said, but calls it, "an off-hand, and misunderstood remark," and censures those who take exception to it.

But it is alleged that I have compromised "the neutrality of my position." If such be the fact, it will be the subject of profound regret, as I have, just at this time, a very poor opinion of compromises.

In the Revised Statutes of Massachusetts, Chapter 23, Section 7, I read as follows :—

“ It shall be the duty of the president, professors, and tutors of the university at Cambridge, and of the several colleges, and of all preceptors and teachers of academies, and all other instructors of youth, to exert their best endeavors, to impress on the minds of children and youth, committed to their care and instruction, the principles of piety, justice, and a sacred regard to truth, love to their country, humanity and universal benevolence, sobriety, industry, and frugality, chastity, moderation, and temperance, and those other virtues, which are the ornament of human society, and the basis upon which a republican constitution is founded ; and it shall be the duty of such instructors to endeavor to lead their pupils, as their ages and capacities will admit, into a clear understanding of the tendency of the above-mentioned virtues to preserve and perfect a republican constitution, and secure the blessings of liberty, as well as to promote their future happiness, and also to point out to them the evil tendency of the opposite vices.”

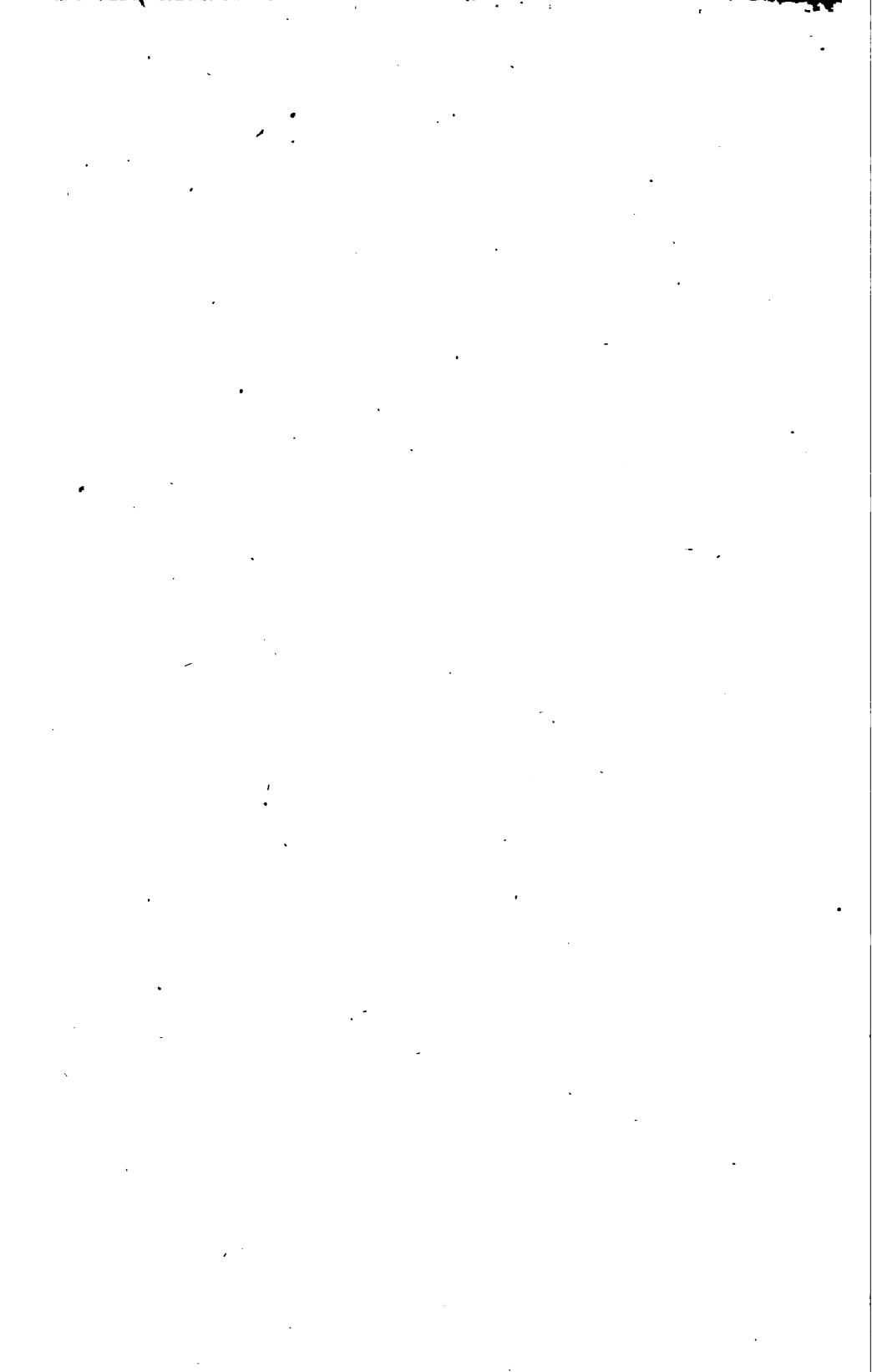
QUERE :—How far a Professor of a College “compromises the neutrality of his position,” when, as a private citizen, before a different auditory, and in another connection, he endeavors to maintain those principles of piety, justice, regard of truth, love of country, humanity, and those other virtues which are the ornament of human society and the basis upon which a Republican Constitution is founded, which it is made his duty, by statutory enactment, to impress upon the minds of his pupils? — How far he departs from “the propriety of his course” when he endeavors to lead others “into a clear understanding of the tendency of the above-mentioned virtues to preserve and perfect a Republican Constitution, and secure the blessings of liberty ;” — and when he attempts to disseminate a knowledge of the true principles of the Constitution of the United States?

Perhaps it may be admitted as some extenuation of my failure to know when, and where, and upon what subjects I may speak, that I was not before aware of the fact that upon great questions of morals and politics, involving, possibly, the very existence of a free government, I hold any neutral position.

J. P.







6  
Parker, Feb

SPECIMEN SHEET,

OR

SHEET OF SPECIMENS,

WITH

NOTES AND QUERIES.

1861. May 18.  
Chas. H. Hall,  
Pres. Mellon,  
Class of '82.

No. 1. — *Specimen of the Boston Daily Advertiser, of Nov. 30, 1858, Charles Hale, Publisher and Junior Editor, showing how the Revision of the Statutes may be criticised, and what may, and what must, be done to the Report of the Commissioners, — in the opinion of a man who has acted as a legislator in this State.*

THE REVISION OF THE STATUTES. — Some of the papers in different parts of the State have begun the discussion of the mode in which the Legislature had best deal with the new revision of the Statutes. As the subject demands careful attention, we cannot complain that it is brought up too soon; although we may be sure that the members of the Legislature when they get together will adopt whatever mode of proceeding seems best to them, independent of undue influence from any outside quarter whatever. In any opinion that we might express, therefore, we should be understood as disclaiming any wish to control the free action of the Legislature. But we confess ourselves somewhat at a loss what course to advise. It is an awkward and inconvenient matter at best; bequeathed to the present administration by the last, like several other matters, unfinished and unpaid for, to be put in good order. There are three possible courses open to the Legislature; either to accept the report of the Commissioners, and pass it into a law just as it stands upon their authority; or to reject it entirely as an abortion of which no good can come; or to review it with patient and intelligent labor, putting each line, section, and chapter to the tests of such examination, and introducing such modifications, if necessary, as shall make the work satisfactory to the Legislature which enacts it.

If the minds of members were already made up upon the subject, or if

they were willing to come to a conclusion upon a matter of so much importance from a superficial examination of the work, they might be willing to pursue one or the other of the first two possible courses which we have suggested, at an early period of the regular session. The matter would then be disposed of, the other business could be transacted, and the Legislature could adjourn without delay. But we do not think that such action would be justifiable on the part of the members, or satisfactory to the people; so that even supposing the work to be accepted or rejected as a whole, an extra session seems to be inevitable, unless the ordinary session be protracted to an undue length.

From these considerations, we think that it will be found to be the simplest way of dealing with the subject, to let it stand by itself as a separate matter, to be examined at first by members individually, receiving from them as much attention as they can spare from their other legislative duties, until the regular business of the session is despatched, which should be done with all due diligence, and without interference from the overshadowing magnitude of the revision. When the ordinary work is thus accomplished, the two houses will be at liberty to give their attention to the extraordinary work, in whatever mode may seem most advisable, and probably the method adopted at the time of the former revision, of a committee to sit during the recess, and an extra session to receive and act upon their report, will be found the most favorable for the proper consideration of the subject. It should be remembered that a revision of the statutes is (as the reader pleases) a necessity or luxury of legislation which occurs but once in a quarter of a century. When it is done, it must be well done, or not attempted at all.

Some portions of the printed text of the revision have been completed, and have elicited various opinions from those to whose inspection a few copies have been submitted. Before any action is taken on the subject, there will of course be a general distribution of the report, as wide as the number printed will allow. It will then be more easy to ascertain how nearly the manner in which the revisers have discharged their task fulfils the just expectations of the people. Meanwhile no undue importance should be attached to opinions founded necessarily upon a partial and hasty examination. With this reservation we are constrained to say, that it does not appear to us, from the examination which we have been able to make of some of the printed sheets, that the revisers have been so successful in reproducing the existing legislation, without alteration, as to justify the Legislature in giving the sanction of enactment to their report as it stands. In the laudable desire to be concise, we fear that they have made some mistakes. We find, for instance, that they propose as one of their rules of interpretation that the word "place" may mean "city and town," "to avoid" (as they say in a note) "the too frequent use of the

words 'city or town,' which often occur in the statutes." Now "city" and "town" both have precise and definite meanings; while "place" is as vague as the size of a piece of chalk or a cloud in a summer's sky. The Commissioners might easily have provided that the meanings of the word "town" should extend to cities, unless obviously inapplicable, which would have answered their purpose as well as to use "place." It is a common rule of interpretation that "he" shall include "she," — it would be thought strange if anybody should propose to use *it* instead of both personal pronouns.

The number of printed pages is reduced one half. This saving of bulk in the statutes is of course a momentous advantage, but it must not be purchased at the expense of a crop of judicial interpretations of altered language, to be sowed this year and reaped annually for the next quarter of a century. We fear that the commission of revisers, notwithstanding the eminent judicial and legal talent upon it, was deficient in that peculiar law-making quality, which can only be evolved by legislative experience,— we mean the art of drawing bills. It is one thing to know law, and to be able to expound it, and another thing to express in language the intent of the framers of a law. In codifying the legislation of 32 years, it would have been well if the revisers had been men particularly apt in the practice of that part of the legislator's duties which fits him to use words and phrases in such manner that their sense shall surely not be misunderstood nor their established meaning perverted. How far the fact that neither of the gentlemen appointed by Governor Gardner to this particular service had acted as legislators in this State for any considerable period, has marred the excellence of their work, in this respect, can only be ascertained by a careful examination.

No. 2.—*Specimen of the Revised Statutes, published in 1836.*

CHAPTER 28.

*Sect. 127.* Each inspector shall furnish himself with proper scales weights, and seals, for the purpose aforesaid, and shall weigh each side of sole leather which he shall inspect, and shall impress thereon his name, and the name of the *place* for which he is inspector, at full length, and also the weight thereof, &c.

CHAPTER 39.

*Sect. 26.* Every person, being about to pass any turnpike gate, and claiming to be exempted by law from the payment of

toll, shall, if required by the toll gatherer thereof, first declare to him his name and *place of abode*; and if he shall, for the purpose of avoiding the payment of toll, wilfully give a false statement to the toll gatherer of his name or *place of abode*, and thereby pass the gate toll free, he shall forfeit, to the use of such corporation, for every such offence, the sum of ten dollars.

*Sect. 37.* Every person, passing on any turnpike road and driving or having the care of a loaded cart or wagon, with wheels the felloes of which are less than three and a half inches wide, shall, upon the request of the toll gatherer, give a true account of the weight of the load, and also his name and *place of abode*; and if he shall refuse to declare, or shall wilfully misrepresent, the weight of his load, or shall give a false account of his name or *place of abode*, with intent to defraud any turnpike corporation, he shall forfeit the sum of ten dollars for every such offence.

*Quere.* "Place of abode." Does this mean a description of the house he lives in?

## CHAPTER 46.

*Sect. 13.* The said overseers, in their respective towns, shall also provide for the immediate comfort and relief of all persons, residing or found therein, not belonging thereto, but having lawful settlements in other towns, when they fall into distress and stand in need of immediate relief, and until they shall be removed to the *places* of their lawful settlements, &c.

*Sect. 19.* The said overseers may, in all cases, send a written notification, stating the facts relating to any person actually become chargeable to their town, to one or more of the overseers of the *place* where his settlement is supposed to be, and requesting them to remove him, which they may do by a written order, directed to any person therein designated, who is hereby authorized to execute the same.

to be removed to the said *place* of his supposed settlement, by a written order directed to any person therein designated, who is hereby authorized to execute the same, &c.

### No. 3. — *Specimen of the Legislation of 1858.*

#### CHAPTER 57.

*Sect. 2.* Whenever the board of overseers, inspectors, or other like officers of any such institution, are satisfied that the health and comfort of such child call for its removal, or that for any cause it is expedient that such child should be removed, they shall give notice to the father or other relatives thereof, if either can be found; and if neither can be found to receive such child, the overseers of the poor of the town in which such child has a legal settlement shall receive the same; or if the said child has no legal settlement in this Commonwealth, it shall be sent to one of the state almshouses, as by law provided in the case of alien paupers.

*Quere.* Where was the member from Boston when "it" was thus used in stead of both personal pronouns?

*Notes to Nos. 2 and 3.* It is quite clear that the Commissioners who reported the Revised Statutes, the committee who made a most elaborate examination of their report, and the legislature who adopted those statutes, could not have read the Daily Advertiser of November 30th, 1858, otherwise they would not have presumed to use the word "*place*," (which is about "as vague as the size of a piece of chalk,") instead of "city or town."

But what must be "thought strange," most strange, is that the legislature of 1858 should have used "it," instead of "he or she."

No. 4. — *Specimen of the legislation of 1858, showing, among other things, "that peculiar law-making quality which can only be evolved by legislative experience,—we mean the art of drawing bills"; and showing of course how bills ought to be drawn.*

#### CHAPTER 1.

*Sect. 1.* No money shall be paid from the treasury of this Commonwealth at any time hereafter, except upon the warrant of the governor, drawn in accordance with some appropriation contained in some act or resolve duly passed within the same political year.

*Sect. 2.* There shall be excepted from the provisions of the

preceding section, all payments required on account of the principal or interest of any public debt, or for the salaries established by standing laws of the judges of the supreme judicial court and of the governor: and said principal and interest shall be paid whenever they may become due, and said salaries shall be paid under the warrant of the governor, in the same manner as if a specific appropriation therefor were included in a separate law passed each year.

*Sect. 3.* This act shall not be construed to prevent the payment from the treasury in any year, to any person or persons to whom the same may be justly due, of any appropriation, or any unexpended balance of any appropriation, duly made in the preceding year. But in case any appropriation or balance shall not be called for by the person or persons to whom it may be due, or shall not be applied to the objects for which it was designed, within the same political year in which it shall have been made, or the succeeding political year, such appropriation or balance shall revert to the general treasury, and shall not afterwards be paid out, except by virtue of a new appropriation.

*Sect. 4.* It shall be the duty of the treasurer to include in his annual report to the legislature, a specific statement of all warrants remaining unpaid, and the names of the persons in whose favor they were drawn; in order that the payment of such sums under this head as may be necessary and proper, may be authorized by new appropriations.

*Notes* to the preceding chapter. Section 1 contains a rule; sections 2 and 3 have nearly five times as much matter by way of exceptions to the rule; and section 4 is designed to provide for cases which have fallen within the rule, making them exceptions also. Taking this chapter as a pattern by which statutes should be constructed, one seventh of a statute-book should be devoted to the enactment of rules, about five sevenths to exceptions to those rules, and the remaining seventh to the provisions for cases falling within the rule, but which ought to have a further provision made for them.

*Queries*, to persons "particularly apt in the practice of that part of the legislator's duties which fits him to use words and phrases." What head is "this head," in the fourth section? How many of the words of the chapter may be omitted as superfluous, in a "laudable desire to be concise," without fear of making "some mistakes"? How much more might it be abridged by an entire reconstruction, without any danger of a crop of doubts arising from the "altered language"?

The commissioners in the execution of their duty have reduced it about one fifth.

If the member from Boston had not possessed "the art of drawing bills," the original act might, perhaps, have read as follows:—

*Sect. 1.* The principal and interest of any public debt, and sums due for the salaries of the governor and judges of the supreme judicial court, shall be paid in the same manner as if a specific appropriation had been made therefor in each year. Any unexpended balance of the appropriation made in one year may be paid to the persons to whom it is due, or applied to the objects for which it was designed, in the succeeding political year.

*Sect. 2.* Except as aforesaid, no money shall be paid from the treasury but in accordance with an appropriation made within the same political year; and unexpended appropriations or balances shall revert to the general treasury.

*Sect. 3.* In his annual report to the legislature, the treasurer shall make a statement of all warrants remaining unpaid, and of the names of the persons in whose favor they were drawn.

#### No. 5.— *Chapter 11, Statutes of 1858.*

*Sect. 6.* In case any appropriation is made in this act for a service or object for which a larger or different appropriation may have been made in some previous act or resolve, the appropriation made in this act shall be held to supersede the other, and so much of the previous act or resolve as provides the larger or different appropriation, is hereby repealed.

*Sect. 7.* It shall be the duty of the auditor to scrutinize all accounts which may be presented for allowance in accordance with the provisions of the acts of the year one thousand eight hundred and forty-nine, chapter fifty-six, as well accounts for services or objects for which definite appropriations are made, as those for which the appropriations are made in the form of an amount not exceeding a certain sum; and he shall have full authority to deduct overcharges in all cases in which he finds them; and it shall be the duty of all public functionaries charged with the execution of any service for which an appropriation is made, to use every effort to accomplish the same for a less sum than the amount of the appropriation, whenever it can be done conformably to the interests of the Commonwealth; and no public functionary shall make any purchases or incur any liabilities in the name of the Commonwealth, for a larger amount than that which has been appropriated by law for the service or object; and it is hereby enacted and declared that the Commonwealth has no responsibility for the acts of its servants and officers, beyond the several amounts duly appropriated by law.



**Sect. 8.** All payments authorized by this act shall be made from the ordinary revenue, except in cases in which another provision is herein expressly made.

**Sect. 9.** All acts and parts of acts, all provisions of law whatsoever, resolves and parts of resolves, customs, traditions, usages, and prescriptions, which are inconsistent with the provisions of this act (excepting only such as may be contained in the constitution of the United States, the constitution of the Commonwealth of Massachusetts, and the first chapter of the acts of the present year) are hereby repealed, abrogated, and annulled.

*Note.* — Section 7 of the foregoing chapter shows what may be comprehended in a bill “making appropriations for the maintenance of the government during the current year,” and how a section may be constructed.

**Sect. 9.** Judging from the vigor of the phraseology, the effect of this section, in the way of repeal, must have been “pro-di-gi-ous.” What a bomb-shell it must have proved among the customs, traditions, usages, and prescriptions. — But its crowning excellence is found, beyond question, in the exception included in the parenthesis. It was quite natural that its author should have been careful to save all the “acts and parts of acts, all provisions of law whatsoever, resolves and parts of resolves, customs, traditions, usages, and prescriptions,” contained in his first chapter of the acts of that year, which chapter was then some two thirds of a month old, from the destructive effects of this tremendous repeal. But there are few legislators, even those with his long experience, who would have exhibited such a marked regard for the acts and parts of acts, resolves and parts of resolves, customs, traditions, usages, and prescriptions, contained in the constitution of the United States, and in the constitution of the State. It could only be done by one having “a peculiar law-making quality.”

*Problem,* for those who “know law and are able to expound it.” What would have been the difference in the operation of the chapter if this magnificent section 9 had been entirely omitted?

**No. 6.** — *Specimen for comparison. One of the Reasons for a very poor opinion of the Revision.*

*Chapter 158, Statutes of 1858.* (By one who knows how “to express in language the intent of the framers of a law.”)

**Sect. 2.** The annual report of the auditor shall contain a summary statement of the receipts into, and payments from, the treasury of the Commonwealth in each year; said report shall also contain a detailed and particular statement of the receipts and expenditures belonging to each year; and for the purposes of this statement the account of receipts shall include all the

revenue properly accruing or provided by law during the year, whether any part thereof be unpaid at the end of the year or not: *provided*, that the amount of revenue thus unpaid shall be distinguished in the account. In like manner, the account of expenditures in the detailed statement shall include, first, the total expense incurred during the year, for the support of all permanent departments, services, and institutions; and, second, all exceptional and special charges, incurred for objects ordered within the year,—the account being constructed in such manner as to show the total expenditure actually incurred within the year, whether the same has been paid during the year, or whether the whole or a part thereof remain unpaid at the close of the year: *provided*, that the amounts paid and unpaid shall be properly distinguished. The variations between said summary account and said detailed account shall be indicated and explained by proper notes and references.

*The above Section as Revised. The Revisers fail to follow the pattern.*

*Commissioners' Report*, Chapter 15, part of Section 6.

"The report" [of the treasurer] "shall contain a summary and detailed statement of the receipts and payments, including in the detailed statement of receipts, all the revenue properly accruing or provided for by law during the year, whether any part thereof is unpaid at the end of the year or not, and distinguishing the amount of revenue unpaid; and in the detailed statement of expenses, the total expenses incurred during the year for the support of permanent departments, services, and institutions, and all exceptional and special charges incurred for objects ordered within the year. The variations between the summary and detailed statements shall be indicated and explained by notes and references. It shall show the total expenses of the year, distinguishing the paid from the unpaid," &c.

No. 7.—*The Revisers are again unsuccessful in "reproducing the existing Legislation."*

*Chapter 313, Statutes of 1848.*

*Sect. 1.* The governor, with the advice and consent of the council, shall appoint and commission some suitable person to be superintendent of alien passengers in each city and town of

the Commonwealth, when it may be necessary for the execution of the provisions herein contained, who, before entering upon the duties of his office, shall be duly sworn, and shall give bonds to the state treasurer, with sufficient sureties for the performance thereof, in such sum as shall be specified by the governor in his commission, and who shall hold said office until another shall be appointed, commissioned, and qualified in his stead, &c.

*Sect. 2.* The governor, with the consent of the council, shall determine the salary of each superintendent of alien passengers by him appointed, and shall specify the same in his commission: *provided, however,* that such salary shall never exceed the net amount of the alien-passenger money received by such superintendent, according to the provisions of this act.

*Memorandum.* Under the provisions of the act seven superintendents were appointed.

*Chapter 132, Statutes of 1858.* (By one "particularly apt in the practice of that part of the legislator's duty which fits him to use words and phrases in such manner that their sense shall surely not be misunderstood.")

*Sect. 1.* The salary of the superintendent of alien passengers is hereby established at the sum of two thousand dollars per annum, to be computed at that rate, from the first day of January, in the year one thousand eight hundred and fifty-eight; said salary to be full compensation for all services rendered to the Commonwealth, by said superintendent, as alien commissioner or otherwise.

*Quere.* Does each of the seven superintendents take a salary of \$2,000! Or is it sometimes difficult to see beyond Boston?

*Revision. Commissioners' Report. Chapter 71, part of Section 10, with a note inserted at the end of the Chapter.*

*Sect. 10.* The superintendent for the city of Boston shall receive a salary of two thousand dollars a year for his services as such superintendent and as a member of the board of alien commissioners; and the superintendent for any other place, such salary as the governor and council may determine, not exceeding the amount of alien-passenger money received by him; and the salary of each shall be expressed in his commission.

*Part of Note to Sect. 10.* "Chapter 132, Statutes of 1858, enacts that 'the salary of the superintendent of alien passengers is hereby estab-

lished at the sum of two thousand dollars per annum,' &c. Although there are several superintendents, it is supposed that this law was intended to apply only to the superintendent for the city of Boston, and its provision is here so restricted."

No. 8. — *Revised Statutes, Chapter 44.*

*Sect. 8.* When the charter of any corporation shall expire or be annulled, as provided in the preceding section, the supreme judicial court, on application of any creditor of such corporation, or of any stockholder or member thereof, at any time within the said three years, may appoint one or more persons, to be receivers or trustees of and for such corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation.

*Statutes of 1847, Chapter 32.*

*Sect. 1.* The directors of every bank, and the trustees of every savings institution, who have been or may hereafter be authorized to settle and close their concerns, and all agents and receivers who have been or may hereafter be appointed to take possession of the property and effects of any bank, shall annually on the second Wednesday of January make a report to the legislature stating, &c.

*Statutes of 1857, Chapter 40 (by one particularly apt, &c.).*

*Sect. 1.* All annual reports of public officers, boards, or institutions, which are now required by law or custom to be made to the legislature, or to his excellency the governor, to be by him transmitted to the legislature, or to be made to the governor and council, shall hereafter include the year ending on the thirtieth day of September annually, and shall be submitted to the secretary of the commonwealth on or before the fifteenth day of October annually.

*Revisers, in a "brown study."* — "Is a receiver appointed by the court a 'public officer'? If he is, are not auditors, referees, &c., appointed by the court, public officers? If he is not a public officer, is he a 'board'?"

"Suppose the court appoint one receiver. If he is not a *board*, his report is to be made to the legislature, on the second Wednesday of January."

"Suppose the court appoint three receivers. Do they constitute a *board*? If they do, their report is to be made to the secretary, on or before the 15th day of October."

"Did the legislature intend that there should be two different periods for making these reports, according as there might be one or more receivers?"

"Is a receiver, or any number of receivers, an *institution*?"

*Revisers' conclusion.*—"It is one thing to know law, and to be able to expound it, and another thing to express in language the intent of the framers of a law."

It is still another thing not to know, or to express, &c. &c.

*Mem.*—For further specimens of the way and manner in which legislative acts should be drawn up, see the remainder of Chapter 40, statutes of 1857. Also Chapter 46, statutes of 1858.

### P. S.—*Extracts from the Daily Advertiser of December 29.*

"We desire, however, to assert most explicitly that it is not true that we have formed—much less expressed—a judgment inimical to the code formed by the revisers."

"Lest this exposition in the Bee should mislead anybody regarding the view which we have expressed, we beg leave to repeat below some parts of our previous article."

"The following are the passages from our previous article to which we desire most particularly to call attention."

And then follow extracts from it,—but the significant suggestion that one of the courses open to the legislature in relation to the report of the commissioners is "to reject it and rely as an abortion of which no good can come,"—all the learned criticism upon the use of the word *place*, by way of an instance of the defects of the work,—and all the latter part of the article, indicating the probable deficiency of the Commissioners "in that peculiar law-making quality which can only be evolved by legislative experience," and their probable incompetency to perform the work committed to them,—are carefully excluded.

Verily this is "the play of Hamlet with the part of Hamlet omitted."

But the Daily Advertiser says: "Mr. Charles Hale has laid no claim to infallibility in the business of drawing bills, confessedly a most difficult task; the allegation that he or others have blundered in the business does not prove that the revisers have made a perfect work."

Very true. His blunders are not cited for any such purpose. And no one pretends that the revisers have made a perfect work. But when Mr. Charles Hale, in his capacity of editor of the newspaper in which "official information" is published "exclusively, by authority," sits in judgment upon that part of the work of the Commissioners which he had seen, and in advance of his legislative action attempts to forestall opinion by a condemnation of it,—specimens of his own work may serve to show how far he is qualified to judge, and how far his opinions and insinuations thus expressed are, or are not, ill-natured and unwarrantable assumptions of a superiority, in which, "we fear," he is "deficient." And the fact that the revisers have not been "successful in reproducing" *some* of "the existing legislation," may perhaps give a clew to the feeling which instigated the article.

7  
**CRITICISM CRITICISED.**

**INTENDED AS A**

**SUPPLEMENT**

**TO**

**THE LAW REPORTER**

**FOR**

**JANUARY, 1859.**

*"Report me and my cause aright."*

*Law Reporter.*

**BOSTON:**  
**LITTLE, BROWN, AND COMPANY.**  
**1859.**



# CRITICISM CRITICISED.

INTENDED AS A

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TO

THE LAW REPORTER

FOR

JANUARY, 1859.

*Prof. Geo. Parker.*

*"Report me and my cause aright."*

*Law Reporter.*

BOSTON:  
LITTLE, BROWN, AND COMPANY.  
1859.



1859 Feb 10

M<sup>rs</sup> of the author?

Jack Parker LLD

## CRITICISM CRITICISED.

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THE readers of these sheets will not need to be informed that there is at this time before the Legislature of Massachusetts the Report of a Commission appointed to revise and consolidate the General Statutes of the Commonwealth.

The subject is one which has engaged the attention of the Legislature, and of the people, more or less, for the term of five years. A proposition for a revision was introduced into the Senate in 1854, and a report was made in favor of the measure by a joint committee of both Houses; but, as the members of the committee were not agreed upon the mode in which the work should be done, the subject was referred to a commission of three learned jurists, who unanimously recommended the appointment of commissioners to revise and consolidate the general statutes according to a plan set forth in the report, for which purpose they reported the form of a resolve.

The resolve was adopted by the Legislature of 1855, and commissioners were appointed. A partial appropriation towards the expenses of the work was made in 1857, and great impatience was manifested in the Legislature of 1858 because the commissioners had not performed an impossibility, by having their report in readiness at that time. It may fairly be inferred from these facts, that a revision of the statutes is desired by the people.

In December, 1858, the commissioners closed their labors with a report in the form of a bill, which contains one hundred and eighty-three chapters, covering about thirteen hundred and seventy-five pages of large octavo, with notes stating the changes which the chapters thus drawn would make in the existing laws, and an introductory report explaining the general principles upon which the work is constructed and the manner of their application.

It is quite apparent that such a work, produced under such circumstances, forms no fit subject for a sharp or captious criticism. The special provisions of the resolve must necessarily operate as limitations, restricting the commissioners both in thought and action. Their duty was, not to legislate, but to reproduce existing legislation in a condensed form, and at the same time in such manner as not to give rise to suppositions of changes, where none were intended.

Power was conferred on them to suggest mistakes, omissions, &c., and the manner in which they might be corrected and amended, but with no right to strike out new measures of legislation, according to the particular views of the commissioners; and they were bound to exercise the power of suggestion cautiously, so as not to seem to invade the province of the members of the Legislature, who were to pass upon the work.

To require of the commissioners, in all cases, perfect accuracy of construction, out of the complex materials before them, would be to exact an impossibility. To demand the highest style of finish in composition, at the same time that the language of existing laws was to be preserved as far as practicable, consistently with the object, in order to avoid suppositions of changes, would be much more oppressive than the requirement of the Egyptian taskmasters, who demanded bricks, but did not furnish the straw then supposed to be necessary for their manufacture.

While the work itself was not of a character to admit

the application even of the ordinary rules of criticism applicable to literary productions, and still less of a cavilling notice, the commissioners, in the execution of their duty, and in their introductory report, did nothing to provoke a style of criticism such as we have spoken of. There is no boasting in saying, "That there has been a measure of success in the attempt at compression, will appear even upon a superficial examination"; or in adding, in reference to the difficulties of construction, "They were obliged to decide, as well as they might, for the purposes of this revision; and they trust that they have not made many or very grave mistakes in this particular." They could hardly have said less. Perhaps they might, without any undue exhibition of vanity, have said something more. But we think they are not supposed to be of the class who go about asking the newspapers to mention their names that they may be seen of men, and they doubtless had a sufficient knowledge of the difficulties attending their work, not to boast greatly even at the time when they were putting off their harness, after a hard campaign.

The commissioners neither deprecated nor sought to avoid criticism. A reasonable measure of self-reliance, and the approbation of persons well qualified to judge, to whom portions of the work were submitted during its progress, might well have led to the belief that the report was not destined to be "rejected as an abortion from which no good could come"; because, after an approval by persons whose duties made them experts to a considerable extent in different branches of it, such a rejection would stultify the members of the Legislature, and not the commissioners. But they not only expected, they desired, that the Legislature should give the work a thorough examination, in order that all errors might be corrected, or if any were left, that the responsibility therefor should rest upon the Legislature, and not with them. And they would doubtless have been pleased to receive from any gentleman suggestions of supposed errors, that the matter might be explained or corrected.

Under such circumstances it may be said that it was the duty of the conductors of any periodical which took an interest in the revision, to render aid according to its ability in the accomplishment of the object, and most especially was this true in regard to any legal periodical within the Commonwealth. The necessity of such a work was too palpable, and the desire of the people had been too distinctly manifested, to permit a doubt whether such a periodical was, in fairness and honesty, at liberty to cast obstructions, however insignificant they might prove, in the way of a revision, either by a direct opposition or by a covert attack.

And it was the duty of such periodical, in any notice of the Report, to deal fairly with it, and to consider the commissioners no further responsible than for a faithful execution of the work within the limitations and surrounded by the difficulties necessarily attendant upon it. How far these duties, whether of a positive or of a negative character, have been performed by the "Law Reporter," published in Boston, may be seen in a critical notice of the revision contained in the number of that periodical for the present month, which has been regarded of such value that it has been published in a separate pamphlet.

It is said in the early part of that article:—

"The work before us bears the marks of the learning and talents of its authors. The laws are, so far as a very general examination will serve us to ascertain, well collated, and arranged according to the instructions contained in the resolve, and there is very great value in the code thus presented to us. The marginal citations have been made with great pains and fidelity, and the whole report is a most valuable depository of and index to the statutes. To bring it to the business test, it is worth much more than the compensation of the commissioners, and the expenses thus far incurred, will amount to. In a work so laborious and so difficult, errors are to be expected,—are indeed, to a certain extent, unavoidable,—and we are far from intending to be understood, by any remarks we may make on such errors, to imply that similar errors might not be found, and in greater degree, in most legislative productions of these days."

It may seem incredible, that after such a broad admission of the ability and diligence of the commissioners, and of the value of their work, any other than a just and impartial, not to say kind criticism, should follow; but we find immediately a clause of a different character.

"In examining minutely," it is said, "those parts of the work which we have above enumerated, we find that the learned commissioners labor under two special disqualifications. They have not sufficient practical knowledge of the present state of our statute law, a knowledge to be acquired only by every-day practice in court or in chambers, and without which no man, whatever his talents and whatever his acquirements in other respects, could safely venture upon the work which the learned commissioners have undertaken. And, secondly, the learned commissioners have not applied to the execution of their task a perfectly nice and critical appreciation of the idioms of the English language; a most common failing in our legislators, and perhaps taken, in this instance, by contagion from the more recent of the laws with which the commissioners have been so closely connected."

Such a want of knowledge of the subject that the commissioners could not safely venture upon the work they had had the presumption to undertake, and such a failure to express in appropriate English the ideas they happened to have, certainly evince rather grave disqualifications.

Whether the paragraph in which the above charge is made is a well-constructed specimen of "idiomatic English," is a question upon which we shall not waste our time.

After this general onset upon the commissioners, portions of the Report, selected probably on the supposition that errors might be found there, if anywhere, are attacked in detail, with a malignity and unfairness limited only by the strength and ability of the assailants. The intention to be captious is avowed, and, aside from the avowal, the design is apparent from the manner and matter of the article. It is doubtless true that "captiousness even, on the part of the learned" "critics, may save much future quib-

bling";—by exhausting a large store of it at the present time.

The article is in the main like the argument which we sometimes hear from a belligerent and conceited lawyer upon his third or fourth case. He must appear to be astute; he must be positive; he must sneer a little; he must make the opposing counsel welcome to some piece of information; &c., &c.;—all which we see in the article before us. The commissioners are designated as "the verbal critics of the Revised Statutes," and taunted with "the great labor they have expended in gilding the refined gold of the Revised Statutes." It is asserted that they

"have substituted, in numerous instances, the plural for the singular," "put the indefinite *a* for the definite *the* and for the distributive *any* or *every*, and have used the present tense of the indicative in place of the future and the subjunctive"; that, "to rid themselves, also, [?] of the awkward repetitions of 'city or town,' an expression which they have unnecessarily substituted for 'town' alone, (*Rev. Stat.*, c. 2, § 6, *clause* 17,) they have resorted to the much more awkward and quite inexact word 'place,' which in respect to its position in idiomatic English, may be said to be 'nowhere.'"

Certainly an awkward position for that word. And then the learned critics say:—

"We will leave this part of our subject with two or three elementary observations on language, to which the learned commissioners are quite welcome.

"1st. In a body of laws, as in all scientific expositions, true elegance must coincide with exactness of expression; and when the same idea is to be repeated, it is not only allowable, but necessary to repeat the same words, unless some other words express the idea with equal precision.

"2d. The indefinite article is not adapted to the designation of a definite object.

"3d. The present tense of the indicative mood is not capable of doing the work of all the other moods and tenses, excepting in a very imperfect manner."

After this magnificent exhibition of elementary wisdom and grammar, the critics attack portions of the report, right and left, both on form and substance ; occasionally, however, giving it a little pat on the shoulder, as a very clever fellow, notwithstanding all its sins and iniquities of omission and commission.

There are other paragraphs besides those relating to the diligence exhibited, the great value of the work, on the one hand, and the special disqualifications of those who executed it, on the other, which savor a little of incongruity. After a page or two of alleged errors, we find, —

“These examples of inadequate and inelegant expression might be indefinitely extended, but our limits oblige us to turn to such mistakes of substance as we have found in the few chapters which we have examined, and which we have ventured to attribute to a want of practical knowledge of the existing law.” — Again, “our readers” “will see” “that the learned commissioners have unconsciously, and apparently by slight inaccuracies of expression, introduced much confusion into the important subject of the jurisdiction of the higher courts.”

Then follows another series of accusations, comprising alleged “mistakes of substance,” and “some extraordinary blunders,” in the few chapters which the “Reporter” professes to have examined, quite too numerous to be committed with impunity. And in passing from one to another of these the critics say : —

“It was the duty of the learned commissioners to inquire and examine into the legal effect of the language which they made use of, so far at least as well-known principles of law and the materials under their hands would enable them to do so. In neglecting this duty, they very much increase the confusion which they ought to dispel,” &c.

But near the close they seem to think, that, if rejected entirely, “much of the good which it has accomplished would survive, and the report would always be a valuable digest of the written law.”



What would thus seem to be rather grave inconsistencies, may perhaps be accounted for by the fact that the "Reporter" has two editors. We were strongly reminded, as we read the different portions of the article, of the description, in the Antiquary, of the law partnership of Messrs. Greenhorn and Grinderson.

"Well said, Mr. Gilbert Greenhorn," said Monkbarns; "I see now there is some use in having two attorneys in one firm. Their movements resemble those of the man and woman in a Dutch baby-house. When it is fair weather with the client, out comes the gentleman-partner to fawn like a spaniel; when it is foul, forth bolts the operative brother to pin like a bulldog."

The difference between the two cases is, that in this instance the fair and foul weather are somewhat mixed up, and that both — partners come out at the same time. But that does not seem to be material.

How it is that a gentleman who "enjoys a high reputation for ability, learning, and legal acumen, well deserved by his faithful and distinguished services as chief justice of the highest court of another State, and as senior professor of the Law School at Cambridge," and another who "has served uprightly and ably in the judiciary of this Commonwealth, and is known as a gentleman of great industry, learning, and accuracy," should, when acting together, labor under such special disqualifications; and how it is that in a work bearing "the marks of the learning and talents of its authors," "well collated and arranged, according to the instructions contained in the resolve," of "very great value," with "marginal citations" "made with great pains and fidelity," "the whole report" being "a most valuable depository of, and index to, the statutes," and which if rejected "would always be a valuable digest of the written law," the authors, in the few chapters selected, should have introduced much confusion into the important subject of the jurisdiction of the higher courts, should have so neglected their duty that "they very much increase the confu-

sion which they ought to dispel," or should, in the small space indicated, have committed half the errors with which they are charged, we leave Messrs. Greenhorn and Grinderson of the Law Reporter to explain.

Desirous of imitating as far as we may the courtesy which the learned critics of the Reporter have extended to the commissioners, and as nearly as may be in their own formulas, we take occasion, before proceeding farther in the examination of the article, to inform our readers, that the senior editor of the Law Reporter is John Lowell, a graduate of Harvard University of the Class of 1843, and a graduate of the Law School connected with that institution; that he obtained an honorable admission to the Bar, and is known, so far as the circulation of that publication extends, as senior editor of the Law Reporter. Within some two or three weeks he has been appointed a Master in Chancery. For aught we know, he has faithfully discharged the duties of that office thus far.

The junior editor is Samuel M. Quincy, likewise a graduate of the same University, of the Class of 1852, who studied the law, and was admitted to the Bar, after which he became junior editor of the Law Reporter. He probably owed this promotion to the fact that he could arrange the abstracts of decisions, and read proof-sheets. "Both are gentlemen whom to know is to respect" — in their proper sphere, when they behave themselves with propriety.

But we are constrained to say, from a minute examination of the whole of their article, that we find that the learned editors "labor under two special disqualifications." According to the evidence as disclosed in the article itself, they were not born into the world for the purpose of criticising the work of the commissioners, and they have not, by any works of their own, been able to overrule the designs of Providence, which intended them for something else. "They have not sufficient practical knowledge" of

the subject; "a knowledge to be acquired only by" a careful study of the work itself, "and without which no man," even if he had been born for the purpose, "could safely venture upon the work which these learned" critics "have undertaken." "And secondly, the learned critics have not applied to the execution of their task a perfectly nice and critical appreciation" of the duties of a legal critic; "a most common failing" in persons who enter upon that department, "and perhaps taken, in this instance, by contagion from" some client or friend who has an interest that the whole attempt at revision should be defeated.

And now having discharged our conscience of the weight of obligation resting upon it, (the reader will please pardon this confusion of the plural and singular, for we have but one conscience,) we proceed to examine the evidence adduced by the learned critics to sustain their two specifications of disqualification on the part of the commissioners; to wit, a want of knowledge of their subject, and secondly, a failure to express such ideas as they had.

Perhaps we may as well consider the evidence in the order, or rather want of order, in which the critics offer it, and thus the last specification shall be first.

The critics profess to be confining their attention chiefly to clearness and perspicuity of expression, and say of the commissioners:—

"They give us such rough jewels as these:

"Ch. 11., § 5. (Declaring what property shall be exempted from taxation.)

"*Tenth.* The property to the amount of five hundred dollars of a widow or unmarried female, and of any female minor whose father is deceased, if her whole estate real and personal not otherwise exempted from taxation does not exceed in value the sum of one thousand dollars."

"Why the property of 'female minors' who are neither single nor widows, that is, who are married, should be exempted from taxation because their fathers are dead, is not apparent, seeing that

they are by their marriage emancipated from the paternal control, and entitled to support from their husbands only."

This is the first example of "inadequate and inelegant expression." The criticism upon the clause cited seems to be only a question why the property of female minors who are neither single nor widows, that is, who are married, should be exempted from taxation. The roughness of the jewel, therefore, seems to consist in the substance of the gem,—in the fineness of the water,—and not to be the result of labor, or want of labor, on the part of the lapidary. ["Very nice and critical appreciation," &c.]

There was sufficient clearness and perspicuity in the provision, to enable the learned critics to understand it, and that seems to be quite sufficient. But the words "female minors" are included in marks of quotation, thereby, perhaps, implying an additional objection. Do the critics mean to say that female minors are rough jewels? If they do, we cannot admire their gallantry. Do they mean to say that some other words would better designate females under age? If they do, it is to be regretted that they did not give us their better version. The clause is a revision of Ch. 43, Statutes of 1858,

"Sect. 1. The property of any widow or unmarried female, or of any female minor whose father is deceased, to the amount of five hundred dollars, shall be exempted from taxation: *provided*, that the whole estate, real or personal, of such person whose property is so exempted from taxation, does not exceed in value the sum of one thousand dollars, exclusive of property exempted from taxation by existing laws."

The Legislature had doubtless sufficient reasons for exempting the property of widows and unmarried females, and of married women who are minors and whose fathers are dead. They saw fit so to do; and as no change is apparent which should affect the policy of the enactment, the commissioners might well have been supposed to overstep the limits of their duty, had they attempted to deprive female minors who are married of the benefit of it.

The commissioners polished the jewel so far as they thought their duty required, and we submit that its intrinsic value will not be enhanced by employing the file of the learned critics upon it.

The critics next cite from the same chapter,

"Sect. 12. Clause 1. All goods, wares, merchandise, and other stock in trade, including stock employed in the business of manufacturing or of the mechanic arts, in cities or towns within the state, other than where the owners reside, shall be taxed in those places where the owners hire or occupy manufactories, stores, shops, or wharves, whether such property is within said places or elsewhere on the first day of May of the year when the tax is made."

Upon which they comment as follows : —

"We hope the assessors will know how to 'make' their taxes on these goods which are and yet are not in cities or towns other than where the owners live, and which are to be taxed in some place which is neither here nor there; especially if the owners of these goods should happen to occupy stores, &c. in more than one town."

From their previous criticism on the word *place*, and from what is said about *place* here, it might be supposed that this unfortunate word created the difficulty in the minds of the learned critics. But perhaps it is because they think that an *if* is lacking, which may be found in the sections revised, [a gentleman critic of a former day says "there is much virtue in an *if*,"] and that instead of the present reading, "*shall be taxed in those places where the owners hire or occupy manufactories,*" &c., the section should read, *shall be taxed in those places if the owners there hire or occupy manufactories, &c.* If this is the objection, we think the difference is one between *tweedle-dum* and *tweedle-dee*; and that the assessors will know how to "make" their taxes just as well with the clause as it now stands, as they would if any other form of expression were to be substituted.

But there is, perhaps, a covert criticism here in the en-

closure of the word *make* in marks of quotation. The clause ends, "when the tax is made."

Will some lady friend kindly favor us with the use of her smelling-salts? There is a slight *faintishness* coming over us.

Hereafter let no person who has any pretensions to "a nice and critical appreciation of the idioms of the English language" presume to speak or write of "making taxes." The seal of condemnation has been set upon *make*, in that connection, in all its forms, whether of the verb or participle. True, this phraseology may be heard all over the state, (Boston, perhaps, excepted,) every year, in the season for *making taxes*. True, it is a part of the "refined gold" of the Revised Statutes: "making of any tax," R. S., Chap. 7, § 15. "Alas, how has the gold become dim, and the fine" ["refined"] "gold changed!" True, Mr. Justice Wilde uses the very same obnoxious word: "if the tax was made, 1 *Cush.* 163. True, Mr. Justice Morton does the same: "make any tax," 5 *Pick.* 501; "having made a tax," 10 *Pick.* 546. True, Mr. Justice Dewey does the same: "collector of taxes or assessments made upon the proprietors," 5 *Met.* 362. But what of that. Mr. Justice Wilde, Mr. Justice Morton, and Mr. Justice Dewey are only learned scholars and jurists. Neither of them has been an editor of the Law Reporter. If it were worth the search, we might probably find a hundred instances of this use of "make" in the Reports.

We recommend to the learned critics to gain a practical knowledge of the use of the English language by "airing their vocabulary" in some broader field than "chambers."

In the next specimen we are more fortunate, inasmuch as the critics give us their emendation.

After copying from Chap. 11, as follows:—

"Sect. 20. Keepers of taverns and boarding-houses, and masters and mistresses of dwelling-houses, shall, upon application of an assessor in the place where their house is situated, give information of the names of all persons residing therein and liable to be assessed for taxes. Every such

keeper, master, or mistress, refusing to give such information, or knowingly giving false information, shall forfeit twenty dollars for each offence,"—the learned critics say:—

"We should think the verbal critics of the Revised Statutes might have translated this section somewhat after this manner: 'Every householder shall, upon application of an assessor of the town where his house is situated, give the names of all persons residing in said house, etc., and upon refusal, etc.'"

Our first remark upon this must be that the commissioners were not appointed to "translate" the statutes, nor to "translate" their own work. "Nice and critical appreciation," &c. "True elegance must coincide with exactness of expression," &c.

Are the learned critics quite sure that it would be safe thus to substitute "every householder" for "keepers of taverns and boarding-houses, and masters and mistresses of dwelling-houses"?

The commissioners copied this part of the section from section 1, chapter 176, statutes of 1837, changing the distributive *every keeper* to *keepers*, &c. If "householder" should be substituted, it ought equally to be so in section 3, chapter 13, of the revision, where similar phraseology is used requiring information respecting persons "liable to enrolment or to do military duty." But that is copied from section 2, chapter 92, statutes of 1840, with a like change from the distributive to the plural. The latter is a revision of section 6, chapter 12, Revised Statutes, where we find the same phraseology; and that in turn is a revision of section 20, chapter 108, statutes of 1809. To make the change, therefore, which the learned critics require, would be to depart from the phraseology adopted nearly half a century since, sanctioned by the commissioners, the committee, and the Legislature in 1835, and followed in 1837 and 1840. Had the commissioners made such a change in the militia chapter, perhaps something might have been said about the "verbal critics of the Revised Statutes" having gilded "the refined gold," &c.

But all this may not be conclusive against the alteration. Are the critics prepared to say, that, if the commissioners had made the alteration, they would not have made an essential change in the rule of law? They do so say by the manner in which they put the charge. But will they stick to it? Gentlemen having a "practical knowledge" of the law, "acquired by every-day practice in court" *and* "in chambers," and whose opinions are entitled to all possible respect, assure us that such a change as the critics propose would make two, probably three, alterations in the rule. A household is defined to be "a family living together." Is a keeper of a tavern a householder? or if he may be in some cases, is he always so? Do all the persons residing in an inn, who are liable to assessment for taxes, belong to the innholder's family, when the connection of several of them with him is merely that they board and lodge in the inn, and pay their bills? But suppose they may be regarded as a part of his family if he keep but one inn; how is it when a worthy gentleman keeps three inns, and lives himself with his family in a fourth tenement? Are the boarders in the different inns a part of his household, — by constructive annexation?

Again: are all the inmates of a boarding-house part of the family of the keeper of the house? Suppose they are, and a man opens a boarding-house, puts his wife in charge, and goes to California or Japan on business. She is the keeper of a boarding-house, but is she a householder?

Again: as the statute stands, mistresses, as well as masters, of dwelling-houses, are required to give the information. A man and his wife live together in a dwelling-house. He is the master, and she is the mistress, of the dwelling-house. The same learned gentlemen say that, on the statute as it stands, she may be required to give the information; which, if the husband were absent but for an hour, might save the assessors the necessity of calling



again. But if the house belongs to him, she is no "householder." What say the learned critics?

The next "example" of the "rough jewels" (it must be the "rough" jewellers who sell by "examples") is taken from the same chapter, the first part of which is a revision of Sect. 1, Chap. 169, Statutes of 1852. The original enacts, that

"When any person shall hereafter give notice in writing to the assessors of any city or town in this Commonwealth, accompanied by satisfactory evidence that he was, at the time of the last annual assessment of taxes in said city or town, an inhabitant thereof, and liable to pay a poll tax, and shall furnish, under oath, true lists of his polls and estate, both real and personal, not exempted from taxation, it shall be the duty of said assessors to assess such person," &c.

At the end of the section is added :—

"*Provided*, the application aforesaid shall be made at least seven days prior to the day of any election."

The commissioners revised as follows :—

"Sect. 48. When a person shall, seven days or more prior to any election, give notice in writing, accompanied by satisfactory evidence, to the assessors of a city or town, that he was at the time of the last annual assessment of taxes in such place an inhabitant thereof, and liable to pay a poll tax, and shall furnish under oath a true list of his polls and estate, both real and personal, not exempt from taxation, the assessors shall assess," &c.

The critics copy the section as revised, and then say :—

"The meaning of this section would be more correctly rendered thus :

"'Whenever any person shall, seven days or more before any election, give written notice and satisfactory proof to the assessors of any town, that he was an inhabitant of such town and liable to assessment but not assessed therein, at the time of the last annual assessment of taxes, and shall furnish under oath a true list of his polls, etc., the assessors shall assess him therefor as if his list had been duly brought in, and shall enter the tax thus assessed in the tax list of the collector of the town, who shall collect and pay it over as if originally entered therein. And the assessors shall, five

days at least before every [?] election, deposit with the clerk of the town a list of the persons so assessed.’”

It is but in accordance with the general character of the rest of their criticism, that in this more correct rendering the learned critics have made one alteration, which they specify, and one blunder, which they do not specify. According to the original and the revision of the commissioners, in order to entitle a person to give the notice, &c., he must be an inhabitant “liable to pay a poll tax.” According to the improved rendering of the learned critics, he must be an inhabitant “liable to assessment.” There are many persons liable to assessment, who are not liable to pay a poll tax.

No reason is given why the commissioners should have inserted such an alteration. On the contrary, the learned critics understand that the “meaning of this section would be more correctly rendered” in their mode, thereby showing that they did not discover the change which they had made.

As to their alteration, they say : —

“ We have added here the requirement that the person claiming this privilege shall not have been already assessed ; as the report stands, any one might wait until his tax bill was rendered, and then claim, under this section, the right to bring in his list with the same effect as if rendered at the proper time.”

Why do the critics say, “ as the report stands ” ? Why not say, “ as the statute stands ” ? Do they desire to make it appear that the commissioners have altered the provision, and that the critics have restored it ? So it would seem, for they profess to be stating objections to the report, and not to the existing law. But in fact the commissioners have revised the statute as it stands, seeing no cause to propose a change ; for it is not true, as the critics suppose, that a man may wait until his tax bill is rendered, and then claim under this section the right to bring in his list with the same effect as if rendered at the proper

time. The object and operation of the provision are well understood out of "chambers."

Will the critics say, in excuse, that these changes are not of great practical importance? That, perhaps, is not quite so clear. But suppose no material change were made. The commissioners are condemned for much smaller matters by the learned critics [we were about to write "Thebans" by way of variety, a word sometimes used, but "inexact"; and we recollect, that "when the same idea is to be repeated, it is not only allowable, but necessary, to repeat the same words, *unless some other words express the idea with equal precision.*" See *ante*, Elementary Observations on Language, by the editors of the Law Reporter, Observation 1st.]

It occurs to us to inquire, by the way, whether persons who bring to "their task a perfectly nice and critical appreciation of the idioms of the English language," could write "*give* written notice and satisfactory *proof*." Lawyers talk about giving evidence, and sometimes speak of offering or of furnishing proofs. But would a lawyer who had a critical care respecting his phraseology say he was ready to *give proof*? Such a mode of expression might answer for the commissioners; but may these learned critics thus trifle with the idioms? We pray judgment. We might urge further, that *evidence* is that which tends to show a fact, or the *medium* by which a fact is established; and that *proof* "is applied by the most accurate logicians to the *effect of evidence*," for which we refer them to Greenleaf's Evidence, Vol. I. Part I. Chapter I. Section 1. But this is a distinction which these very learned critics can hardly be expected to appreciate. "True elegance must coincide with exactness of expression." See Elementary Observations before cited.

We come next to what are alleged to be mistakes of substance, and we find the following introductory paragraph:—

"We begin with the chapters on the supreme court, court of

common pleas, and superior court, and find some extraordinary blunders in the important matter of their respective authority and jurisdiction in civil cases."

It is in relation to this subject also that it is said the commissioners "very much increase the confusion which they ought to dispel," &c.

It will be found, we think, that the "confusion" has been introduced into the brains of these very learned critics by some other agency, and that the "extraordinary blunders" are of their own manufacture.

They first extract from the chapter concerning the court of common pleas.

"Chapter 113, § 4. The court shall have exclusive original jurisdiction of complaints for flowing land, and of all civil actions not cognizable by police courts and justices of the peace and of which the supreme judicial court has no jurisdiction.

"§ 5. The court shall have original and concurrent jurisdiction with the supreme judicial court of writs of entry for the foreclosure of mortgages, actions respecting easements on real estate, petitions for partition, and of all other civil actions in which the sum demanded in damages exceeds three hundred dollars; and original and concurrent jurisdiction with police courts and justices of the peace, of actions of contract, tort, and replevin, of which such justices have jurisdiction, where the debt or damages demanded, or the value of the property alleged to be detained, exceeds twenty and does not exceed one hundred dollars; except actions of replevin of beasts distrained for the recovery of any penalty or forfeiture, or to obtain satisfaction for damages."

Upon these sections the first commentary is this: —

"What are the 'other civil actions' of all which this court is to have concurrent jurisdiction with the supreme judicial court? We do not see how the word 'other' can be construed to relate to any actions excepting such as the context points out; it can hardly refer back to the chapter on the supreme court, in which certain civil actions are placed under the exclusive cognizance of that court. If not, this section purports to give to the court of common pleas concurrent jurisdiction of real actions in which damages happen to be demanded, of actions of waste and of tort in the nature of waste, all which have heretofore belonged, and which the commissioners have already said shall continue to belong, exclusively

to the higher tribunal. In the act from which this section was taken there is no such ambiguity."

If it were true that "other civil actions" cannot be construed to relate to any actions except such as the context points out, the context points to actions of which the supreme court have concurrent jurisdiction with the common pleas, and not to actions of which the supreme court have exclusive jurisdiction, or of which the common pleas have exclusive jurisdiction.

By Sect. *six*, Chap. 112, exclusive jurisdiction is given to the supreme court, of actions of waste and of tort in the nature of waste, &c. By Sect. *seven* of the same chapter, the same court is to "have original and concurrent jurisdiction with the court of common pleas, and in the county of Suffolk, with the superior court, of writs of entry for foreclosure of mortgages, actions respecting easements on real estate," &c., "and of all other civil actions in which the damages demanded or property claimed shall exceed in value," &c.

Will the critics contend that this section gives the supreme court concurrent jurisdiction with the common pleas of actions of waste, and of tort in the nature of waste, in which the damages demanded exceed \$3,000 in Suffolk, and \$300 in other counties, because the words "other civil actions," as used in this section, include actions of waste, and of tort in the nature of waste; and that they cannot look back to the preceding section and see that exclusive jurisdiction of the last-named actions is given to the supreme court, for which reason the common pleas cannot have a concurrent jurisdiction, nor the supreme court a jurisdiction concurrent with any other court? The confusion in their minds does not seem to have reached that precise point. But the argument would be just as valid as the one they make upon the chapter relating to the common pleas. Reference may be had to a preceding chapter, as well as to a preceding section of the same chapter. If the critics had studied the work better,

they would have discovered that all the chapters form but a single bill, divided into chapters for convenience. The different parts are adjusted with reference to each other. The whole is to be construed together. To put the case a little stronger:— Chap. 112, having provided in section *six* that the supreme court shall have exclusive jurisdiction of actions of waste, and of tort in the nature of waste; and in section *seven*, that that court shall have concurrent jurisdiction with the common pleas in certain actions enumerated, and of all other civil actions in which the sum demanded in damages shall exceed \$300;— if the chapter relating to common pleas had given to that court concurrent jurisdiction with the supreme court, of *all civil actions* in which the sum demanded in damages exceeds \$300, that jurisdiction would not include actions of waste and of tort in the nature of waste. No lawyer, practising out of “chambers,” would think of raising a doubt about it. The misfortune of these very sagacious critics is, that, having studied the law in but a limited way, they are not familiar with its principles and maxims; and from practising in “chambers” they are short-sighted.

The second commentary which the critics make on sections *four* and *five* of Chapter 113, is this:—

“To make amends to some extent for this enlargement of its powers, the commissioners have deprived the court of common pleas of most of its jurisdiction over suits of replevin. For, in such suits, ‘the sum demanded in damages’ is only such as the plaintiff may choose to consider himself to have suffered by the *detention* of the property sought to be recovered; a thing quite accidental in its relation to the substance of the issue, and which bears no fixed proportion to the value of the property itself. By the existing law, the courts have concurrent jurisdiction of all such suits where the ‘damages demanded or *property claimed* exceeds, etc.’ The important words which we have italicized are omitted in the new draft.”

It seems almost cruel to say that here also the learned editors are unfortunate in not having studied the work

they undertake to criticise, far enough to find that it contains a chapter upon replevin. If they had made that discovery, they might have read : —

“ Chap. 143, § 11. When the property alleged to be detained does not exceed in value one hundred dollars, the writ may be sued out from, and returnable to, a justice of the peace, or police, or justice's court, for the county in which the goods are detained ; and in all cases the writ may be sued out of the court of common pleas, or, in the county of Suffolk, the superior court, and shall in such case be returnable to the same court for the county in which the goods are detained.”

This is the way in which the commissioners “ have deprived the court of common pleas of most of its jurisdiction over actions of replevin.”

Will the learned critics attempt to excuse their “ extraordinary blunder,” upon the ground that this provision ought to have been in the chapter concerning the common pleas ? Its position is part of the “ refined gold of the Revised Statutes.” Nothing is there found respecting replevin in the chapter concerning the common pleas. The commissioners found the matter in the chapter on replevin, and left it there.

But the omission of the words “ *or property claimed* ” would not deprive the court of common pleas of any jurisdiction over the action of replevin, if there had been no provision respecting the jurisdiction in the chapter on replevin ; because a party can as easily demand in damages a sum exceeding \$ 300, as he can allege that the value of the property claimed exceeds that sum, and much more easily than he can prove the latter fact. The omission of those words, therefore, in the fifth section, is quite unimportant as it respects any action.

The learned critics next quote sections *eleven* and *twelve*, Chap. 113, respecting the removal of actions, as follows : —

“ Sect. 11. Actions entered in the court when the *ad damnum* in the writ is over three hundred dollars may before the trial has commenced be carried by consent of parties to the supreme judicial court, etc.

“ Sect. 12. If the defendant in such an action or the respondent in a pe-

tition for partition, or any person on behalf of either of them, at the first term at which such defendant or respondent is held by law to appear, shall make oath, etc., he may remove the action."

Upon these sections this is the commentary: —

"Here, too, the words 'or property claimed,' are omitted; so that if replevin suits for property worth more than three hundred dollars could, by any construction, get into this court, it is certain that they must stay there until they are tried, unless the plaintiff shall have demanded considerable damages for the detention of the property. Besides, there are writs of entry to foreclose mortgages, in which no *ad damnum* is usually inserted, which are now and should continue subject to this law of removal, but in which, if this section be adopted, the choice of the forum will rest solely and conclusively with the plaintiff."

If by this the learned critics intend to be understood that the words "or property claimed" are omitted in section *eleven*, they are entirely mistaken. That section is a revision of part of Chapter 162, Statutes of 1844, where the right of removal by consent of parties is made to depend upon the "*ad damnum*."

But in relation to section *twelve*, it is true that the words have been omitted; and it is perhaps true that in this particular the commissioners have committed an error, — one which is not extraordinary, and which would create no confusion whatever, — one which is in fact very unimportant so far as any practical consequence is concerned, — but still an error.

We will not waste time in showing what a very limited class of cases it can effect, nor in speculating how it might have happened; whether the commissioners thought the provisions of this section should be assimilated to those of section *eleven*, which is a revision of a later act, and intended to make the omission, so as to put removals by the agreement of the parties and by the act of the defendant on the same ground, and failed to make a note of the change, or whether it was from some other cause, let it stand confessed that the change may affect writs of replevin, and



writs of entry to foreclose mortgages, when *the plaintiff sees fit to lay his damages so low as to deprive himself and the defendant of the privilege of carrying the case up, before trial, by agreement.* As the parties may still have a trial in the common pleas, and go to the supreme court on questions of law, the cases affected by the omission, if the section were to remain as it is, would not be cases of great hardship.

We next find a criticism on the chapter concerning the superior court. It is said : —

“Turning to the superior court, which is the common pleas made local, we find that its concurrent jurisdiction is defined only by a general reference to the chapter on the court of common pleas, and this chapter is liable, therefore, to the criticism which we have just made to that ; but its exclusive jurisdiction is very much enlarged. Here is the whole section : —

“Chapter 114, § 2. The court shall have the same powers and jurisdiction in civil actions and proceedings in the county of Suffolk as the court of common pleas has in other counties, except that such jurisdiction shall be exclusive in all civil actions in which the damages demanded or property claimed exceed in amount or value one hundred dollars and does not exceed three thousand dollars.”

“Here the words ‘or property claimed,’ are retained, as they should be, but the words ‘civil actions,’ are open to a similar criticism to that made upon ‘all other civil actions,’ in a former chapter. These very words have been held to include, in some connections, suits in equity ; and they certainly include actions for waste and writs of entry, of both of which the supreme court has sole cognizance.”

This objection to the report, so far as it relates to the concurrent jurisdiction of the court, has been answered by what has been already said respecting the objection to the concurrent jurisdiction of the common pleas. That which relates to the “exclusive jurisdiction” of the superior court requires some comment. It is said that this is “very much enlarged,” and this alleged enlargement, it seems, is supposed to arise from the words, “all civil actions.” “These

three hundred dollars, &c.; and if those actions in which the 'property claimed' exceed the required limit, but the *ad damnum* does not, can be removed from the superior court in this mode, it must be by an implication arising out of the language of this section, which by its terms only purports to make an exception to a grant of power; an implication which, we apprehend, would not be warranted by any sound rule of construction."

The learned critics do not venture to stake any professional reputation upon an *assertion* that the section is not sufficient; but it is somewhat amusing to observe their argument, that, if actions in which the property claimed exceeds in value \$ 3,000, but the *ad damnum* is less, may be removed, it must be by an implication arising out of the language of this section, "*which by its terms only purports to make an exception to a grant of power*"; an implication which they apprehend would not be warranted.

The objection which they make is similar to the one upon which we have just exposed the absurdity of their criticism next preceding. They ignored it there, to make an attack, where the language of exception is express. They seem to have a glimmering consciousness of it here, for the purpose of another attack, although there is neither the form nor the substance of an exception to sustain it.

The most remarkable part of this criticism, however, is found in the last clause. The critics say:—

"The very sweeping language of this section, too, would seem to assert that no defendant should remove a cause by bill of exceptions or appeal; an apparent discrimination against defendants which cannot have been intended."

But the objection arises from an apparent, and an actual, want of discrimination, on the part of the critics, between removal upon application of the defendant, or by consent of parties, and removal on a bill of exceptions, or by an appeal.

Sect. 11, Chap. 113, provides for the removal of actions to the Supreme Court, by consent of parties, before trial;

Sect. 12, for a removal on application of the defendant, at the first term, &c., supported by an affidavit of defence. Sects. 14–17 provide for appeals upon matters of law after judgment; and Sects. 19, 20, for the allowance of exceptions to any opinion, ruling, direction, or judgment of the court below in matter of law, (except, &c.) in any civil action, suit, or proceeding, upon which a case may be removed. But by Sect. 21 no trial is to be prevented or delayed by the allowance of exceptions, &c. Here, then, are four classes of cases in which there may be removals, — two modes of removal before trial, and two afterwards.

The section in question provides that there shall be no removal upon application of the defendant, or by consent of parties, (two of the four classes,) except when the *ad damnum* or the value of the property exceeds a certain amount, which is precisely the law as it stands at present. The critics think that this “very sweeping language” (!) includes the other two classes. Now this not only shows that they have not that “perfectly nice and critical appreciation of the idioms of the English language,” which is essential for critics, but it shows also, among divers other instances, that, in relation to this particular work, for some reason or other, they have no appreciation at all of the right use of words.

The next allegation is :—

“There are other inaccuracies in *this chapter* [“these chapters”]. Thus we find elaborate provisions, copied with too faithful accuracy from the Revised Statutes, respecting appeals from the common pleas. That the appellant shall give sureties, if required, to prosecute his appeal, etc.; that he shall file in the supreme court full copies of all the papers in the case, excepting the depositions, of which he shall take up the originals; and minute details as to entering appeals, etc.

“Now most of these details are unnecessary, some are unfair, and some are absurd.”

The matter is introduced as an *inaccuracy*; — that is, as

very words," it is said, "have been held to include, in some connections, suits in equity, and they certainly include actions for waste, and writs of entry, of both of which the supreme court has sole cognizance."

And so the reasoning seems to be that by this section exclusive jurisdiction is given to the superior court, perhaps, in some connections, of suits in equity, and certainly of actions for waste and writs of entry, of both of which the supreme court have exclusive jurisdiction.

This would be a most singular piece of legal logic if the words in question were in a grant of jurisdiction. But we will not waste time on that. It so happens that the words are in an exception, and if this exception operated to enlarge the jurisdiction of the court in the manner suggested, it would be the most remarkable exception we ever heard of. Laying aside what relates to suits in equity, which is rather indefinite, the construction of the exception by the critics would make the section read substantially after this manner:—

"The court shall have the same powers and jurisdiction in civil actions and proceedings in the county of Suffolk, as the court of common pleas has in other counties, except that such jurisdiction" [that is, the same jurisdiction which the court of common pleas has] "shall, in the superior court, be exclusive in all civil actions, (including actions for waste and writs of entry,) in which the sum demanded in damages or property claimed exceeds in amount or value one hundred dollars, and does not exceed three thousand dollars" (of which actions of waste and writs of entry the supreme court have exclusive jurisdiction, and the court of common pleas have no jurisdiction). Most wonderful exception! Most astute critics!!

We have ever understood that the office of an exception is to operate upon the matter with which it is connected, making some qualification relating to that matter;—in this case, therefore, qualifying or altering in the superior court the exclusive jurisdiction, which but for the excep-

tion that court would have, in the county of Suffolk, precisely like that which the common pleas have in other counties. In other words, providing that, of the jurisdiction given by the section in the first instance, the part which was exclusive should vary in the matter specified; — as if it had said, “except that whereas the jurisdiction of the common pleas is exclusive in all civil actions, in which the sum demanded in damages exceeds one hundred dollars, and does not exceed three hundred dollars, the jurisdiction of the superior court shall be exclusive in all civil actions in which the sum demanded in damages or property claimed exceeds in amount or value one hundred dollars, and does not exceed three thousand dollars.”

But the learned critics make the exception an additional original grant of exclusive jurisdiction, beyond that of the common pleas; and not only so, but make that jurisdiction exclusive over certain matters, of which exclusive jurisdiction is by the same act given to the supreme court.

If this be to have “a perfectly nice and critical appreciation of the idioms of the English language,” the commissioners may well rejoice, in not having applied such an appreciation to the execution of their task.

The existence of the partnership of Greenhorn and Grinderson, in the editorial charge of the Law Reporter, will certainly not suffice to account for this criticism. It is unmistakably the work of Greenhorn alone.

The next criticism relates to the removal of actions from the superior to the supreme court.

“Sect. 5. No action shall be removed from said court to the supreme judicial court upon application of the defendant or by consent of parties, unless the damages demanded or property claimed exceed in amount or value the sum of three thousand dollars.”

The critics having quoted this section, remark upon it as follows: —

“Now, as we have seen, the only actions which can be removed from the common pleas are those in which the *ad damnum* exceeds

an error on the part of the commissioners; — and then the first allegation is that they have “copied with too faithful accuracy” sections of the “refined gold” of the Revised Statutes, providing that an appellant shall recognize with sureties, if required, to prosecute his appeal, and to produce in the court above copies of the writ, pleadings, and judgment, &c., and original depositions and other evidence.

The reasons given for the objections are, that since 1840 appeals have been allowed only in matters of law; that “the mode of taking up questions of law which is now most used is by bill of exceptions”; that “it is unnecessary to make other or different regulations for entering or prosecuting appeals from those which apply to exceptions”; that “it is not fair to require a recognizance in carrying a point of law to the only court competent finally to decide it”; and that “it is absurd to require the appellant to carry up papers and copies which, when carried up, a higher court cannot possibly consider, — as the learned commissioners do when they require anything but the ‘record’ to be taken to the supreme court.”

But it is not alleged that there has been any repeal of these provisions, as there clearly has not. It is not alleged that they are practically superseded by the change respecting appeals. They are only less necessary, perhaps. But *more or less necessary* is a question for the Legislature, and not for the commissioners; and the Legislature making the change considered the necessity for carrying up the papers sufficient to induce them to leave these provisions unrepealed.

The importance of the provisions, however, is perhaps greater than the critics suppose. The statute of 1840, allowing appeals on matters of law, provides that the supreme court may, for good cause, allow the parties to withdraw or amend the pleadings. It is quite clear, therefore, that the higher court to which the papers are carried can consider the pleadings; — and although it is provided that, if the pleadings end in an issue of fact, the

case shall be remanded to the court of common pleas, to be there tried, there seems to be nothing to prevent a submission of the case to referees, after the court have allowed the parties to withdraw their pleadings, in which case the evidence may be laid before the referees, and perhaps, after the return of the report, come under the consideration of the court, upon exceptions to it.

Moreover, as the cause, with its pleadings and written evidence, is in the supreme court by the appeal, it is quite possible, to say the least, that, if the issue of law upon which the case was appealed is removed out of the way, by a withdrawal of the pleadings, a trial by jury may be waived by consent, and the case tried by the supreme court, upon all matters of fact, under the provisions of Chapter 267, Statutes of 1857. There is no provision requiring the case to be remanded, unless after an amendment of the pleadings they shall end in an issue of fact. Perhaps the learned critics have not considered this matter as deeply as they thought they had.

The criticism then proceeds:—

“Another somewhat similar imperfection exists, as it seems to us, in that part of the chapter on the supreme court which relates to the equity powers of that tribunal.”

It should be recollected that the critics were speaking of “inaccuracies,” and an “imperfection” is not necessarily an inaccuracy. “When the same idea is to be repeated,” &c. See *Elementary Observations*.

The commentary is quite too long, and too unimportant, to be copied at large. The substance of the objection is, that the commissioners have retained some specifications of the equity powers which might have been omitted. The answer is, that the commissioners found these specifications in the statutes, and they found also a subsequent general grant of equity jurisdiction in all cases where there is not a full, adequate, and complete remedy at law. The question arose, how far the enumeration of the equity

powers, found in the Revised Statutes, might be omitted, because those powers were included in the general clause.

It was readily seen that some of them might be omitted, and that some could not be; and, respecting others, there was a grave doubt to which class they belonged. The objection to omitting any of them, unless all which were included in the general clause were omitted, was palpable. The commissioners thought that the safer course was to retain them. They, however, stated their difficulty to an authority as much higher than that of the editors of the Reporter, as the authority of the latter is higher than that of a boy on the first form of a primary school; and, having followed the advice they received, are content to leave this matter to the consideration of those who can estimate the reasons for the course which they pursued, which were stated in a brief note at which the critics sneer, as "the careful and detailed opinion of the learned commissioners." They were fully aware that the Legislature could readily strike out such portions as they might deem unnecessary.

The suggestion, that, because one of these enumerated grants has been held to have only a restricted application, its insertion may operate to restrain the general words subsequently used, is a piece of captious nonsense that does not require a further reply.

They next copy a part of

"Chapter 113, § 19. A party whose motion for a new trial is overruled, or who is aggrieved by any opinion, etc. of the court in matter of law, (except upon questions arising on pleas in abatement,) in any civil action, etc., may allege exceptions thereto, which, being reduced to writing in a summary mode, and presented to the court before the adjournment without day of the term at which his motion is so overruled or he is so aggrieved, &c., shall be allowed, &c."

Upon this the critics say: —

"By the natural construction of this section any party may allege exceptions to the overruling of his motion for a new trial, although the ground of that motion be, as indeed it almost always is, in that court, one of fact, as that the verdict is against evidence, or for newly discovered evidence, etc."



And then follows a sneer respecting "this new and valuable privilege."

It is true that there is an error in this section as it stands in the body of the report. But as the critics, in the early part of their article, admit that, "in a work so laborious and so difficult, errors are to be expected, are, indeed, to a certain extent, unavoidable," it would not have required a great stretch of their imaginations to have supposed that a list of corrections might be found somewhere. Corrections accompanied the former revision, respecting which the critics should have known something. They were therefore "put upon inquiry" for such a list, which is to be found at the end of the present work, in which the error in this section is corrected.

Now one of two things is true. Either the critics saw this correction, and chose, notwithstanding, to ignore it, and ridicule the section as erroneous,—or they did not see it, which was a most insufferable carelessness in persons who, after their fashion, undertook to enlighten the public in relation to the faithfulness with which the commissioners had performed their duty. These very facetious critics may seat themselves on which horn of the dilemma they please, and laugh at Section 19 of Chap. 113 at their leisure.

They next say : —

"There are a few other discrepancies of detail in these three chapters, as in the careful and proper provision that the salaries of the judges of two of the courts shall be paid quarterly, while no such solicitude is manifested for the third ; but we have found nothing requiring special comment here."

Most careful and reliable critics!! Exactly the reverse of this is true. There is no provision, in the chapter concerning the supreme court, or in that concerning the court of common pleas, for a quarterly payment of the salaries of the judges. But there is a provision in each by which the salaries are to be received from the treasury of the

Commonwealth; and, in section *thirty-one* of Chap. 15, there is a general provision that "salaries payable from the treasury shall be paid quarter-yearly, on the first days of April, July, October, and January," inserted in that chapter to avoid a multitude of repetitions.

As the salaries of the judges of the superior court are not received from the treasury of the Commonwealth, but from that of the city of Boston, a "careful and proper provision" that these salaries should be paid quarterly was inserted in the chapter concerning that court.

The critics next turn to the chapter concerning certain rights and liabilities of husband and wife, formed in a great measure from recent acts of the Legislature, making marked changes in the law relating to married women, the operation of which in all their bearings cannot readily be foreseen. They extract

"Ch. 108, § 1. The property, both real and personal, which any married woman now owns as her sole and separate property, that which comes to her by descent, devise, bequest, gift, or grant, that which she acquires by her trade, business, labor, or services, carried on or performed on her sole and separate account, that which a woman married in this State owns at the time of her marriage, and the rents, issues, profits, and proceeds, of all such property, shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected, and invested by her, in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts."

The first commentary is: —

"Upon this section we must remark that brevity seems to us to have been consulted at the expense of clearness. Its language, down to the word 'account,' applies literally and properly only to women already married, and the whole clause therefore excludes women who may be hereafter married, from the benefit of receiving or acquiring, in any manner, while married, any separate property. Two words would have removed this difficulty."

We answer that two words are not necessary to remove the difficulty, because there is no difficulty. The language of the section down to the point mentioned does not apply

only to women already married, and does not, therefore, exclude women who may be hereafter married, from the benefits mentioned. The first part of the clause may be confined to women now married, because it relates only to the property which any married woman now owns; but in what follows, the pronouns *her* and *she* refer to "any married woman," and apply to all cases hereafter; the indicative present being as well adapted for that purpose as any other mode and tense.

They next say:—

"A captious critic might add" (and so they proceed to add) "that the second clause of this paragraph seems to be aimed [?] at one married woman only, though at which one in particular is not so clear. Sancho Panza said, there was but one good wife in the world, and every fool thought he had her. Probably the learned commissioners consider it sufficient to legislate for that model woman, trusting to the general application of their singular precepts."

The learned critics are ill to please. They allege against the commissioners that they have put the indefinite *a* for the definite *the*; and the second of the elementary observations on language to which they kindly make the learned commissioners quite welcome is, "The indefinite article is not adapted to the designation of a definite object." And yet the learned critics, in the exuberance of their fancy, here give the indefinite *a* the definite application.

How this section should be constructed, they are not kind enough to inform us; but as it is quite clear that the indefinite *a* is, in this connection, equivalent to the distributive *any* or *every*, and just as good, with the merit of being shorter, the inference is that the critics insist that the definite *the* should have been used, so that the clause would read "that which *the* woman married in this State owns," and then their story about Sancho Panza would have been more appropriate.

Another objection to this chapter is found in the allegation, that the portions of Chapter 208, Statutes of 1845,

found in sections *twenty-seven* and *twenty-eight*, are "now obsolete." We doubt the authority of the critics to say that. They do not allege that these portions are expressly repealed, or superseded by the substitution of some other provision. They may be disused "in chambers," but that does not make them *obsolete*.

The remaining matter to which specific exception is taken, is the first part of

"Sect. 8. A married woman having separate property, may be sued for any cause of action which originated against her before marriage, and her property may be attached and taken on execution in the same manner and with the same effect as if she were sole."

The first commentary is : —

"This clause is not found in the act of 1857, which related principally to women already married, but is copied from two earlier statutes, both of which were applicable chiefly to women thereafter to be married."

There are two blunders in this statement of four lines. The part of the section cited is copied from, or rather is a revision of, but one statute. (See Sect. 5, Chap. 208, Statutes of 1845.) And the provisions of that chapter were not applicable chiefly to women thereafter to be married. The first and second sections contain provisions regarding ante-nuptial contracts, which apply of course to women thereafter to be married. If the critics had looked beyond these sections they would have found that the remaining sections, eight in number, relate to any married women. But the fifth section, authorizing suits against married women, if strictly interpreted, is perhaps confined to cases where a woman holds property conveyed, devised, or bequeathed to her, under the provisions of that act. As this was, however, the first of the acts expressly authorizing women so to hold property, the principle of the provision contained in that section, making a woman so holding property "liable to be sued in law and in equity," "upon any contract by her made, or wrong by

her done before her marriage, in the same manner and with the same effect as if she were unmarried," seems at this day to be applicable, whether the property has been acquired under the provisions of that or of any other act of the same class.

The Legislature will probably have the benefit of the "very substantial limitations and exceptions" which the learned editors would *advise* should be introduced "into this brief and sweeping enactment."

The learned critics ask divers questions respecting the effect of portions of this chapter. It is quite probable that they may desire some information upon what even they confess is a difficult subject. When they specify any further charges against the chapter, they may perhaps obtain an answer, if the case seems to require one.

And now having finished our examination of the specific objections to the several chapters which the critics profess to have examined, we turn to the general objections stated in the early part of the article, respecting the use of the plural and singular, &c.

The critics should have read the third chapter of the work which they attempt to criticise, even if they did not suppose that to be the one in which they could find the greatest number of errors. If they had done so, they would have found the second rule for the construction of statutes, part of which is: "Words importing the singular number may extend and be applied to several persons or things; words importing the plural number may include the singular." What objection exists to declaring "two or more mortgagors to be the owners of real estate until one mortgagee takes possession, when he becomes the owner," the critics have not been so kind as to inform us. Whether the objection is to the use of the plural and singular, or to the use of the definite article, or both, we are left in doubt. Certainly there may be two or more mortgagors, and one mortgagee, who, when he takes possession, becomes a very definite object.

But "the indefinite *a*"! — We admit there is no rule, in chapter three, covering the use of the indefinite *a*; and we fear we shall not convince the very learned critics. It is one of the constitutional principles of mutual admiration societies to magnify the merits of all the members of the clique, and to see no worth beyond the pale of the association. And in like manner there are a few young men, we hope mostly among the clerks in the shops which retail small wares, who think that Boston comprehends "all creation"; some of them admitting, however, that Massachusetts constitutes the suburbs of that city. The very learned critics seem to have trained themselves as critics in that kind of school. They have evidently come to the conclusion that the Revised Statutes (*passed*, they say, in 1836) are the perfection of human reason; and there is no particular evidence, in the article, that they are aware that there are any other statutes in the world; if indeed they have, for the purpose of considering the merits of the statutes of Massachusetts, any notion that there is any world beyond the limits of the Commonwealth, except perhaps "another State," the existence of which they admit from the fact that the chairman of the commissioners once resided there. If, as critics of statute literature, they had been aware that there is a place called the State of Maine, they might possibly upon inquiry have learned that the statutes of that State have been recently revised; that commissioners appointed for the purpose made a report, which was committed to Mr. Chief Justice Shepley, late of the supreme bench of that State, for farther revision, after which his report was considered and adopted by the Legislature. And upon looking into the statute-book, prepared with all this care, they would have found

Ch. 119. Containing nine sections. §§ 1, 2, 3, commence with "Whoever wilfully and maliciously sets fire," &c. §§ 4 and 5. "Whoever wilfully and maliciously burns," &c. § 7. "Whoever breaks and enters," &c. § 8. "Whoever with intent," &c. This formula is uniform, or nearly so, in all the chapters on crimes.

Ch. 6, § 115. "Such treasurers" (state, county, town, and parish) "may make out their warrants directed to a coroner of the county, when a sheriff or deputy is deficient as aforesaid," &c.

Ch. 11, § 12. "Towns may make such by-laws, &c., and may annex a suitable penalty, not exceeding twenty dollars, for any breach thereof."

§ 13. "Such towns shall appoint, at their annual meeting, three or more persons, who alone shall make complaints, for violations of said by-laws, to the magistrate having jurisdiction thereof by said by-laws, and execute his judgments."

Ch. 18, § 42. "Surveyors shall give reasonable notice, and in writing if required, to each person on his list, resident in town, of the amount of his tax," &c. "The tax may be paid to the surveyor in money," &c.

§ 51. "Towns may raise money for the repair of bridges and ways, and direct the same to be assessed and collected as other town taxes, to be expended for the purpose by the selectmen, or by road commissioners, as the town directs."

Ch. 4, § 23. "When at a town meeting," &c. § 51. "If the selectmen of a town or assessors of a plantation wilfully neglect," &c.

Ch. 11, §§ 1 and 4. "A town at its annual meeting," &c. § 3. "A town containing," &c. § 7. "A town raising," &c. § 9. "A town may choose," &c. § 23. "A district may choose," &c. Ch. 14, § 26. "A town may establish," &c. § 34. "A town may choose," &c. § 39. "When a householder or physician knows that a person under his care is taken sick of any such disease, he shall immediately give notice thereof to the municipal officers of the town where such person is, and if he neglect it, he shall forfeit not less than ten, nor more than thirty dollars."

According to the critical notions of the Reporter, we must suppose that, when some one householder or physician has given this notice, the section will have accomplished its object and will be no longer in force.

Ch. 2. Library, § 19. "Moneys appropriated for its use are to be expended," &c.

Ch. 11, § 76. "The presidents of colleges in this State are removable at the pleasure of the trustees and overseers whose concurrence is necessary for their election."

Ch. 18, § 28. "Plantations required to assess a state or county tax have the like powers and are subject to the like liabilities and penalties as towns respecting ways." § 45. "Each surveyor at the expiration of his term is to render to the assessors," &c.

Ch. 19, § 10. "Teams with wheels, &c. must have the rims of their wheels," &c. "And no team drawn by more than six horses is allowed to travel on them." "The owner or driver of a team violating this provision forfeits twenty dollars," &c.

Ch. 1, § 4, Clause 7. "The word inhabitant means a person having an established residence in a place."

These specimens may serve to show how the people of Maine, who are so unfortunate as to have no "Law Reporter" within their borders, have been left to construct their statutes. Unsuspicious people! They cannot be aware what a set of laws they are living under. If perchance a copy of the January number of the Boston periodical has been sent to that State, we hope it will not fall into the hands of the governor; for if it should, it may stir him up to such a sudden flood of apprehension, that he will incontinently call the Legislature together to provide for the public safety, by a new revision of the statutes, which shall restore all the old forms of statute phraseology, stay the farther progress of attempts at brevity and improvement, and insure the reign of a wise conservatism in the making of statutes, until the number of the Law Reporter for January, 1859, and his message founded thereon, shall have been forgotten.

We have no expectation that these references to the statutes of Maine can change the opinion of the learned critics respecting the "idiomatic English" of the present revision. On the contrary, the fact that the formulas are made more uniform in this revision than in the statutes of Maine, will probably only serve to make the matter with them more objectionable.

Respecting "the present tense of the indicative, in place of the future and the subjunctive," we shall not rest the case of the commissioners upon the statutes of Maine. The considerations above adverted to serve to show that any defence founded on them may be swept away by an extra session. We shall therefore produce a better witness. If the reader will turn to the statute-book of Massachusetts for 1858, — (he may take the Blue Book, so called, or the cheaper edition furnished to towns, or the supplement, for that year, to the Revised Statutes, edited by



Horace Gray,) — he will find chapter one hundred and fifty-four : —

**“ An Act in Relation to the Crime of Murder.**

*“ Be it enacted, &c., as follows :*

**“ SECT. 1.** Murder committed with deliberately premeditated malice aforethought, or in the commission of an attempt to commit any crime punishable with imprisonment for life, or committed with extreme atrocity or cruelty, is murder in the first degree.

**“ SECT. 2.** Murder not appearing to be in the first degree is that in the second.

**“ SECT. 3.** The degree of murder is to be found by the jury.

**“ SECT. 4.** Whoever is guilty of murder in the first degree shall suffer the punishment of death for the same, subject, however, to such conditions, regarding the time and manner of executing sentence, and the custody or imprisonment of the convict prior thereto, as shall have been otherwise provided by law.

**“ SECT. 5.** Whoever is guilty of murder in the second degree shall be punished by imprisonment in the state prison for life.

**“ SECT. 6.** Nothing herein shall be construed to require any modification of the existing forms of indictment.

**“ SECT. 7.** This act shall take effect from and after its passage.”

That is the whole of it, with its present tense of the indicative, instead of the future and the subjunctive, and with “ Whoever ” instead of “ When any person shall,” or “ Every person who,” or “ If any person.”

That act, it is understood, was introduced by a jurist and scholar, who is generally supposed to have “ a sufficient practical knowledge of the present state of our statute law,” “ a perfectly nice and critical appreciation of the idioms of the English language,” and the ability to express his ideas accordingly. The form of expression which is appropriate in a statute imposing the highest penalty known to the law may perhaps be admissible in other cases.

We shall not enter into an argument to show that the word “ town ” alone will not answer all the purposes for which the commissioners have used the word “ place,” nor upon the propriety of the use of the latter word. This same “ awkward and quite inexact word,” “ place,” is a part of the refined gold. See Revised Statutes, Chap. 7, Sect. 30 ;

Chap. 28, Sect. 127; Chap. 39, Sects. 26, 37; Chap. 46, Sects. 13, 19, 20. It is also used in the very sense in which the commissioners have used and explained it, by

Mr. Chief Justice Parsons, in *Granby v. Amherst*, 7 *Mass. Rep.* 1;

Mr. Justice Parker, in *Putnam v. Johnson*, 10 *Mass. Rep.* 498; also in *Harvard College v. Gore*, 5 *Pick.* 369;

Mr. Justice Wilde, in *Jennison v. Hapgood*, 10 *Pick.* 77; also in *Greene v. Greene*, 11 *Pick.* 410;

Mr. Chief Justice Shaw, in *Lyman v. Fiske*, 17 *Pick.* 231 (three times); also, in *Abington v. North Bridgewater*, 23 *Pick.* 170 (thirteen times); also, in *Thorndike v. City of Boston*, 1 *Met.* 242; also, in *Sears v. City of Boston*, 1 *Met.* 251 (twelve times); also, in *Stevens v. Boston and Maine Railroad*, 1 *Gray*, 281; also, in *Buckley v. Inhabitants of Williamstown*, 3 *Gray*, 493 (five times);

Mr. Justice Metcalf, in *Mead v. Inhabitants of Boxborough*, 11 *Cush.* 362; also, in *Nutting v. Connecticut River Railroad*, 1 *Gray*, 502 (three times);

Mr. Justice Fletcher, in *Fitchburg v. Winchendon*, 4 *Cush.* 190 (three times); and by

Mr. Justice Merrick, in *Lee v. City of Boston*, 2 *Gray*, 484.

So used also in the opinion of the Justices signed by Mr. Chief Justice Shaw and Justices Wilde, Dewey, and Hubbard, 5 *Met.* 586 (twelve times).

Furthermore, we have *State Reporter v. Law Reporter*. This "awkward and inexact word *place*," the position of which "in idiomatic English may be said to be nowhere," is used by Mr. Reporter Gray (without the excuse that it is to rid himself *also* of the awkward repetition of "city or town") in making up his abstracts. See 1 *Gray*, 277; *Ibid.* 502, before cited; also, *Lexington and West Cambridge Railroad v. Staples*, 5 *Gray*, 520. Thus it appears that Mr. Reporter Gray does not write "idiomatic English," and that parts of his abstracts are "nowhere." But Mr. Reporter Gray approves of the criticism upon the

report of the commissioners, kisses the rod which flogs him over their shoulders, and blesses the Law Reporter; and the Law Reporter says, in a notice of 5th *Gray*, in which the last offence was committed, "Mr. Gray's Reports are uniformly well done."

But we have an authority which may be more satisfactory to the Law Reporter. In the argument for the plaintiff, found in *Lee v. the City of Boston*, 2 *Gray*, 484, it is said, the "plaintiff's domicile was in Brookline on the first of January, 1853. That was the *place* of his principal occupation";—"for the purposes of taxation, every one resides, or has his residence in, or is an inhabitant of, that town or *place* where he has his legal domicile";—"for every one is still to vote in the city or town of his domicile, which is the *place* appointed by the constitution." The argument was made by John Lowell, senior editor of the Law Reporter, and was reported, probably from his notes, certainly by Mr. Gray; "and Mr. Gray's reports are uniformly well done."

The question remains, Which is "nowhere," the awkward and inexact word "*place*," or the very silly criticism which objected to the use of it? and that question we leave to the decision of our readers.

We have referred already to the sneers respecting "the verbal critics of the revised statutes," and to the paragraph in which the sneerers "see cause to regret that the learned commissioners had not devoted to the careful reconstruction of these laws" (laws passed since 1836) "a considerable part of the great labor which they have expended in gilding the refined gold of the Revised Statutes."

This part of the subject demands some further consideration. We are among those who have had all reasonable regard for the Revised Statutes. The gentlemen who acted as members of that commission were very learned jurists, for whom while living, and for whose memory when dead, we have entertained the highest respect. We would utter no word of them except in deserved eulogy. We should

no more think of publishing to the world, that in the execution of their work they committed "extraordinary blunders," than we should think of committing any other imaginable injustice and impertinence. That they discharged their duty faithfully, and we are pleased to add acceptably, there seems to be no doubt. To anything in the way of commendation of their labors, involving no invidious comparison, we should by no means be disposed to add a qualification; but the very sagacious editors of the *Law Reporter* have seen fit to put the matter otherwise. And while we should have been among the last to challenge a comparison between the report of 1835 and that of 1858, when the comparison is challenged with taunts and sneers, we see no reason why it should not be met fairly and frankly.

We say, then, in the first place, that the duty of revision which devolved upon the first commission was not so arduous as that which devolved upon the commission whose labors have recently terminated. It is true that the period of time embraced within the scope of their labors was longer. But they had the advantage of the compilation, completed in 1822, by two gentlemen who now occupy seats upon the bench of the Supreme Court of the Commonwealth, and who are widely known as among the most distinguished jurists of the United States. This compilation presented, in a compact form, the state of the statutes as existing about twelve years before the labors of the commission began, showing what was then in force and what repealed. The subsequent legislation had not been voluminous, nor had it made great changes. And the legislation of the whole period had been generally of a simple character, and readily understood. Their labor of arrangement may perhaps be regarded as greater, but the whole construction of the arrangement found in the *Revised Statutes* was by no means an original work of the commissioners. They say in their report that "they naturally directed their attention to the elaborate and valuable

code lately adopted by the State of New York"; — that "it was thought to be in many respects sufficiently well adapted to the purposes of a systematic digest of the statute law of our Commonwealth; and its general plan has accordingly been kept in view in the present revision." For the purposes of citation and reference it was not deemed convenient. That the commissioners derived aid in the arrangement of their chapters from the index to the compilation of 1822, is apparent upon a cursory examination. That commission introduced into the statutes many new provisions. What proportion of them were derived mainly from the common law may be seen by an examination, and we need hardly say that it is easier to prepare such new provisions than it is to reconstruct from complicated statutes already passed. That the work which they performed was greater than was originally anticipated, we may be assured, from the fact that the Legislature, at the January session of 1834, appointed a committee to receive their report when completed, and examine it; which committee were never called together, because the report was not in readiness that year. Governor Davis, in his address to the Legislature at the January session of 1835, alluding to the delay, said: "The labor of the commissioners must have been arduous and perplexing; and the delay in making the report should be viewed only as a proof of their anxiety to bring their work to a mature form."

The commissioners who made the report of 1858 had the arrangement and plan of the Revised Statutes for the basis of their work, and thus were saved a portion of not the most difficult duty. But there was still no small amount of labor of that character devolving upon them. Many new chapters were required by the subsequent legislation, and it must not be forgotten that it was necessary to revise the whole body of the Revised Statutes, as well as the subsequent legislation, because large portions of those statutes had been repealed or modified,

sometimes by express enactment, but more often by legislation more or less inconsistent with their provisions. For these and for other reasons, it was important, and sometimes necessary, to rearrange the matter of many of the chapters. The quantity of matter to be revised was much greater, and although notes and references were to be found, there was no intermediate compilation, like that of 1822, to facilitate the work. We need only add, which is perhaps the most significant fact, that the legislation of the last eight years has introduced greater changes of principle, as well as of detail, than that of any similar period, — perhaps greater than that of any period of three times the extent, — and we have said enough to make good the assertion with which we started, that the duty of revision which devolved upon the first commission was not so arduous as that which devolved upon the last.

Next we say, and we do it with no desire to abate anything from the well-earned reputation of that commission, that the committee of the Legislature who revised their work, and who were authorized to report new provisions, reported one hundred and seventy pages of amendments, a great number of them of a verbal character. How many a similar committee will report on the present revision remains to be seen. If the editors of the *Law Reporter*, or their colaborers in the work of emendation, are to prepare them, in the spirit and after the manner of their work thus far, the proposed amendments will doubtless be much more numerous, and of much less importance.

We wish to say no more of the “refined gold,” purified in the crucible of the legislative committee in 1835, than that any one who enters upon a critical examination and study of it, will very soon admit that the recent commission did not err in supposing that some improvement might be made in the arrangement of the matter of the different chapters, and also in the phraseology.

The learned critics say of the work : —

"In point of style, it has always appeared to us to be as nearly perfect as human infirmity is likely to permit, though erring a little, perhaps, on the side of a prudent redundancy of expression."

They are doubtless in favor of a composite style, as there are in the Revised Statutes at least three different styles of composition. We say it not by way of reproach. The fact is readily accounted for, when we consider that it is the work of three or four persons, probably laboring separately in the preparation of the different chapters.

These are some of the facts to be taken into consideration in making a comparison between the labors of the two commissions. But without these, let the two reports be placed side by side, and if the present report will not compare favorably with that which preceded it, either in the precision and accuracy with which the rules of law are stated, the arrangement of the matter, or the general style and finish of the work, let it be rejected.

Nay, more; let this comparison be made between the present report and the report of the former commission, corrected as it was by the committee of the Legislature, and passed to be enacted,—with the refined gold of the Revised Statutes;—and if the former cannot stand the test in all the particulars before mentioned, let it be rejected.

The American Jurist, the Law periodical of that day, inserted a notice of the report of 1835; and if the editors of the Law Reporter had been half as learned, and wise, and courteous, as their predecessors of a former age, we should have been spared this comparison.

Perhaps we ought to add a few specimens of the gold and of the gilding, that the fineness of the one and the application of the other may be seen.

R. S., Chap. 15, Sect. 24. "If by reason of death, resignation, or removal from town, a major part of the selectmen originally chosen in any town shall vacate their office, those who remain in office shall have the same power to call a town meeting, as the whole number first chosen would have had."

Revision, Chap. 18, Sect. 25. "If by reason of death, resignation, or removal from town, a major part of the selectmen thereof originally chosen shall vacate their office, those who remain in office shall have power to call a town meeting."

R. S., Chap. 15, Sect. 26. "At all the town meetings, except those held for the election of governor, lieutenant-governor, senators, representatives in the general court, representatives in congress, electors of president and vice-president of the United States, and county commissioners, a moderator shall be first chosen."

Revision, Chap. 18, Sect. 26. "At every town meeting, except for the election of national, state, district, and county officers, a moderator shall first be chosen."

R. S., Chap. 15, Sect. 36. "Whenever *neither the assessors, nor the selectmen*, chosen by any town, shall accept the trust, or, having accepted it, *shall not perform the duties* thereof, the county commissioners may appoint three or more suitable persons within the county, to be assessors of taxes, for such town; and the assessors, so appointed, shall have the like powers, and be subject to the like duties, and receive the like compensation, as assessors chosen by the town.

"Sect. 37. In case of such neglect to choose selectmen or assessors, the county commissioners may appoint three or more assessors for such town."

Revision, Chap. 18, Sect. 37. "If a town neglects to choose selectmen or assessors, or if the persons chosen do not accept the trust, or having accepted it shall not perform the duties, the county commissioners may appoint three or more suitable persons within the county, to be assessors of taxes for such town; who shall have the powers, perform the duties, and receive the compensation, of assessors chosen by a town."

R. S., Chap. 15, Sect. 40. "If any person, so chosen and summoned, and not exempted by law from holding the office to which he is elected, shall not, within seven days, take the oath of office, before the town clerk, he shall, unless the office to which he is chosen shall be that of constable, or some other for which a different penalty is provided, forfeit the sum of five dollars, to the use of the town; provided, always, that every such person, who shall take the oath of office, before a justice of the peace, and file a certificate thereof, under the hand of such justice, with the town clerk, within the said space of seven days, shall be exempted from said penalty."

Revision, Chap. 18, Sect. 41. "If a person so chosen and summoned, who is not exempt by law from holding the office to which he is elected, shall not within seven days take the oath of office before the town clerk, or before a justice of the peace and file with the town clerk a certificate



thereof under the hand of such justice, he shall, unless the office to which he is chosen is that of constable or some other for which a different penalty is provided, forfeit five dollars."

R. S., Chap. 15, Sect. 29. "The treasurers of towns may, in their own names and official capacities, prosecute any suits upon bonds, notes, or other securities, given to them or to their predecessors in office."

Sect. 63. "The treasurers of towns, in all cases, where no other provision is specially made, shall prosecute for all fines and forfeitures, which may enure to the use of their towns, or of the poor thereof."

Revision, Chap. 18, Sect. 56. "He may in his own name and official capacity prosecute suits upon bonds, notes, or other securities, given to him or his predecessors in office, and where no other provision is specially made, shall prosecute for all fines and forfeitures which may enure to his town or the poor thereof."

R. S., Chap. 15, Sect. 75. "Every constable may, in the execution of a warrant or writ duly directed to him, convey, beyond the limits of his own town, as well any prisoners as things, in his custody under such process, either to the justice who issued it, or to the common jail or house of correction of the county, of which such constable is an inhabitant."

Revision, Chap. 18, Sect. 70. "A constable in the execution of a warrant or writ directed to him, may convey beyond the limits of his town, prisoners and property in his custody under such process, either to the justice who issued it, or to the common jail or house of correction of his county."

R. S., Chap. 15, Sect. 84. "In case any town shall be sentenced to pay a fine, for a deficiency in the highways or town ways within the same, the surveyor, within whose limits such deficiency may be found, shall be liable to the town for the amount of such fine and all costs of the prosecution, to be recovered by the town in an action of the case, provided such deficiency exist through the fault or neglect of such surveyor."

Revision, Chap. 18, Sect. 79. "If a town shall be sentenced to pay a fine for a deficiency in the highways or town ways therein, any surveyor through whose fault or neglect such deficiency existed, shall be liable for the amount of such fine and all costs, to be recovered by the town in an action of tort."

R. S., Chap. 15. See act of amendment, Sect. 88. "When any city or town shall be required to enter into a recognizance, the mayor and aldermen of the city, or the selectmen of the town, may by an order or vote authorize any person to enter into the recognizance in the name and behalf of the city or town, and such recognizance shall be binding on the city or town, and on the inhabitants thereof, like any other contract lawfully made by such corporation."

"Sect. 89. No surety shall be required in any recognizance of a city or town."

Revision, Chap. 18, Sect. 19. "When a town is required to enter into a recognizance, the selectmen may by an order or vote authorize any person to enter into the recognizance in the name and behalf of the town, and it shall be binding like any other contract made by such town. surety shall be required in such recognizance."

R. S., Chap. 16, Sect. 6. "The ordering, governing, and repairing of any work-house, erected or provided at the joint expense of two or more towns, and the appointing of a master and necessary assistants, as well as the power of removing them from their respective offices and trusts for misconduct, incapacity, or other sufficient cause, shall be vested in a joint board of directors, who shall, from year to year, be specially chosen by the several towns, at their annual meeting."

Revision, Chap. 22, Sect. 6. "The ordering, governing, and repairing of such house, the appointment of a master and necessary assistants, and the power of removing them for misconduct, incapacity, or other sufficient cause, shall be vested in a joint board of directors, who shall be chosen annually by the several places interested."

R. S., Chap. 18, Sect. 7. "In case the pulling down or demolishing of any house or building, by directions of the firewards or other officers aforesaid, shall be the means of stopping the said fire; or if the fire shall stop before it come to the same, then every owner of such house or building shall be entitled to recover a reasonable compensation therefor from the town; but when the building, so pulled down or demolished, shall be that in which the fire first began and broke out, the owner thereof shall receive no compensation therefor."

Revision, Chap. 25, Sect. 5. "If such pulling down or demolishing of a house or building shall be the means of stopping the fire, or if the fire shall stop before it come to the same, the owner shall be entitled to recover a reasonable compensation from the city or town; but when such building shall be that in which the fire first broke out, the owner shall receive no compensation."

R. S., Chap. 18, Sect. 8. "In any such case of fire, if any person shall purloin, embezzle, convey away, or conceal any furniture, goods or chattels, merchandise or effects of the inhabitants whose houses or buildings shall be on fire or endangered thereby, and shall not, within two days, restore or give notice thereof to the owner, if known, or, if unknown, to one of the firewards or selectmen of the town, the person so offending shall be deemed guilty of larceny and be punished therefor, as is provided in such case in the one hundred and twenty-sixth chapter."

Revision, Chap. 24, Sect. 8. "Whoever shall purloin, embezzle, convey away, or conceal, any furniture, goods or chattels, merchandise or effects,

of persons whose houses or buildings are on fire or endangered thereby, and shall not within two days restore or give notice thereof to the owner, if known, or, if unknown, to one of the firewards, mayor and aldermen, or selectmen, of the place, shall be deemed guilty of larceny."

R. S., Chap. 19, Sect. 19. "Each town shall, at its own expense, and in such places therein as the inhabitants shall direct, maintain one or more sufficient pounds, in which swine, sheep, horses, asses, mules, goats, and neat cattle, may be restrained and kept for the causes mentioned in the one hundred and thirteenth chapter.

"Sect. 20. Every town, that shall, for the space of three months, neglect to provide or maintain a sufficient pound, shall forfeit the sum of fifty dollars, to the use of the county in which such town is situated."

*Mem.* The use was changed by Chap. 272, Statutes of 1848.

Revision, Chap. 25, Sect. 18. "Each city and town shall, at its own expense, and in such places therein as the city council of the city, or the inhabitants of the town, shall direct, maintain one or more sufficient pounds. A city or town that shall, for three months, neglect to provide or maintain a sufficient pound, shall forfeit fifty dollars."

R. S., Chap. 28, Sect. 62. "If any chocolate manufactured in this state shall be offered for sale, or be found within the same, not being of one of the qualities described in the two preceding sections, and marked as therein directed, or, if any such chocolate shall be put on board any vessel or carriage of conveyance, for the purpose of being transported out of this state, the same may be seized and libelled, according to the provisions of the one hundred and eighteenth chapter, concerning the seizing and libelling of forfeited goods; and for that purpose, any justice of the peace may, upon complaint made to him, issue his warrant, directed to any sheriff, deputy sheriff, or constable, requiring them respectively to make such seizure; and if upon the trial it shall appear that the seizure was lawful, the said chocolate shall be deemed to be forfeited, and shall be sold and disposed of, according to the provisions of the same chapter."

Revision, Chap. 49, Sect. 21. "If any chocolate manufactured in this state shall be offered for sale or found within the same, not being of one of the qualities described in the two preceding sections and marked as therein directed, or if any such chocolate shall be put on board of any vessel or carriage of conveyance for the purpose of being transported out of this state, the same shall be forfeited and may be seized and libelled."

*Note* to this section, at the end of the chapter: "The Commissioners have omitted the special provisions respecting libelling chocolate, leaving it to the general rule prescribing proceedings in relation to forfeited goods."

R. S., Chap. 39, Sect. 76. "Every railroad corporation shall be liable, as well to the owners of the lands first taken, as to the owners of those

taken for making such variations, for all damages occasioned by taking the same; and the said owners shall have the same remedies, for securing and recovering payment of said damages, as are provided in other cases under this chapter."

Revision, Chap. 63, Sect. 39. "Every corporation shall be liable to the owners of lands taken for making such variations, for all damages occasioned by taking the same, to be recovered in the manner hereinbefore provided for recovering such damages."

R. S., Chap. 39, Sect. 86. "If any horse or other beast shall be *found* going at large, within the limits of any railroad, after the same is opened for use, the person, through whose fault or negligence such horse or other beast shall *be so found*, shall, for every such offence, forfeit a sum not exceeding twenty dollars, for every horse or other beast so found going at large, and shall also be liable for any damages thereby sustained by any person, to be recovered in an action on the case, by the person sustaining such damages."

*Mem.* If this section had been found in the Revision, the learned critics might perhaps have made themselves merry over a suggestion that the commissioners had imposed the penalty upon the person through whose neglect the horse was found; and not upon the person through whose neglect he was going at large.

"Revision, Chap. 63, Sect. 103. The person through whose fault or negligence, a horse or other beast shall go at large within the limits of a railroad after it is opened for use, shall for every such offence forfeit a sum not exceeding twenty dollars, and shall also be liable for any damages thereby sustained by any person, to be recovered in an action for tort."

These extracts, taken principally from Chapter 15, R. S., and Chapter 18 of the Revision, present, in the main, fair specimens of what the learned critics are pleased to denominate "gilding the refined gold of the Revised Statutes." Whether the operation has not been rather the removal of small particles of alloy, let the reader judge. We regret that we have been obliged to say thus much respecting the Revised Statutes. We have no intention of treating the commissioners who reported them with the slightest disrespect. They performed an onerous and difficult duty, in a manner to entitle them to the respect and gratitude of their contemporaries, and of posterity. But the Revised Statutes may well exclaim, "Save us from incompetent and injudicious friends."

This sneer about gilding the fine gold is suggestive. The spirit with which this attack has been made is quite remarkable. The war is commenced ostensibly for the public good. But the public good had no occasion to object to the revision in this sneering and captious manner. Public good is a courteous person, who could have stated any objections which he had to the report in terms of decent civility, such as are fit to be used by one gentleman towards another. Public good would have contented himself with stating his objections to the commissioners or to the Legislature, in order that such errors as he supposed he had discovered might be corrected, and not have spent his money in printing and distributing extra copies of a virulent attack upon the commissioners and the report, in order to excite a prejudice. He is evidently put in the front rank as a cover for some other personage who is slyly fighting behind in his name. The inquiry naturally arises, who is this party who is so keen for the attack, that he is willing to furnish the sinews of war, — the material aid, — and is not very particular in the choice of his missiles.

“*The refined gold of the Revised Statutes!*” Aha! Somebody is the proprietor of certain stereotyped plates of the Revised Statutes; very useful, of course, in the multiplication of copies of those statutes, but worth very little more than type metal whenever a revision shall be made. And there is a Supplement prepared each year to correspond in form with the Revised Statutes, containing head and marginal notes to the several chapters, and some references. The Supplements are entered for copyright. Copies are, probably, on hand, or the Supplements are stereotyped. Now it is quite clear that this somebody is interested against the adoption of the revision, can afford to spend some money to prevent it, has friends, and can do them a good turn in some way for any services which shall throw discredit upon the work of the commissioners, even if that discredit does not end in rejection, but only

in delay. The idea that the work, although valuable in the main, is full of small errors, with some extraordinary blunders, and that a long period must be required for its examination, may be useful, even if the idea that it is to be rejected as an abortion from which no good can come, must be abandoned. And this matter of interest may serve to explain how it is, that the revision, if rejected, might be so very valuable; which at first seemed somewhat marvellous. If it could be rejected, the Revised Statutes and the Supplements thereto still remain as the means of bringing in the refined gold to those interested. At the same time this rejected revision might be very useful to lawyers who practise "in chambers," enabling them the more readily to investigate and ascertain the true state of the statute law on a given subject; for which town, city, and other officers, and the people at large, who have no copies, must pay, when they seek advice. We have not the remotest idea that honorable gentlemen of the Bar will sustain any such pettifogging notion, if it exists. We make no charge that these things are so; we only say that the supposition furnishes a solution to some things, the explanation of which is not otherwise apparent.

The editors of the Reporter say, "We have taken five or six chapters of the work" (which they specify) "and given to them a thorough and careful consideration. We have no reason to suppose that these chapters are other than a fair specimen of the whole work." They selected their chapters, which are among the most difficult, and "*we* have no reason to suppose" they intended to select the best specimens. This examination of their objections shows that in their five or six chapters they found one error, of very little importance. The report contains one hundred and eighty-three chapters. At this rate there should be, in the whole report, about thirty small errors, which will affect nobody injuriously. Did not the critics make a mistake in their selection? We think this "too low a figure." If their labors furnish a fair specimen, Bassanio's remark

respecting Gratiano's reasons might be applied in a reversed form, as thus : — The commissioners' errors are, two grains of chaff hid in two bushels of wheat ; you shall search all day ere you find them, and when you have them they are not worth the search.

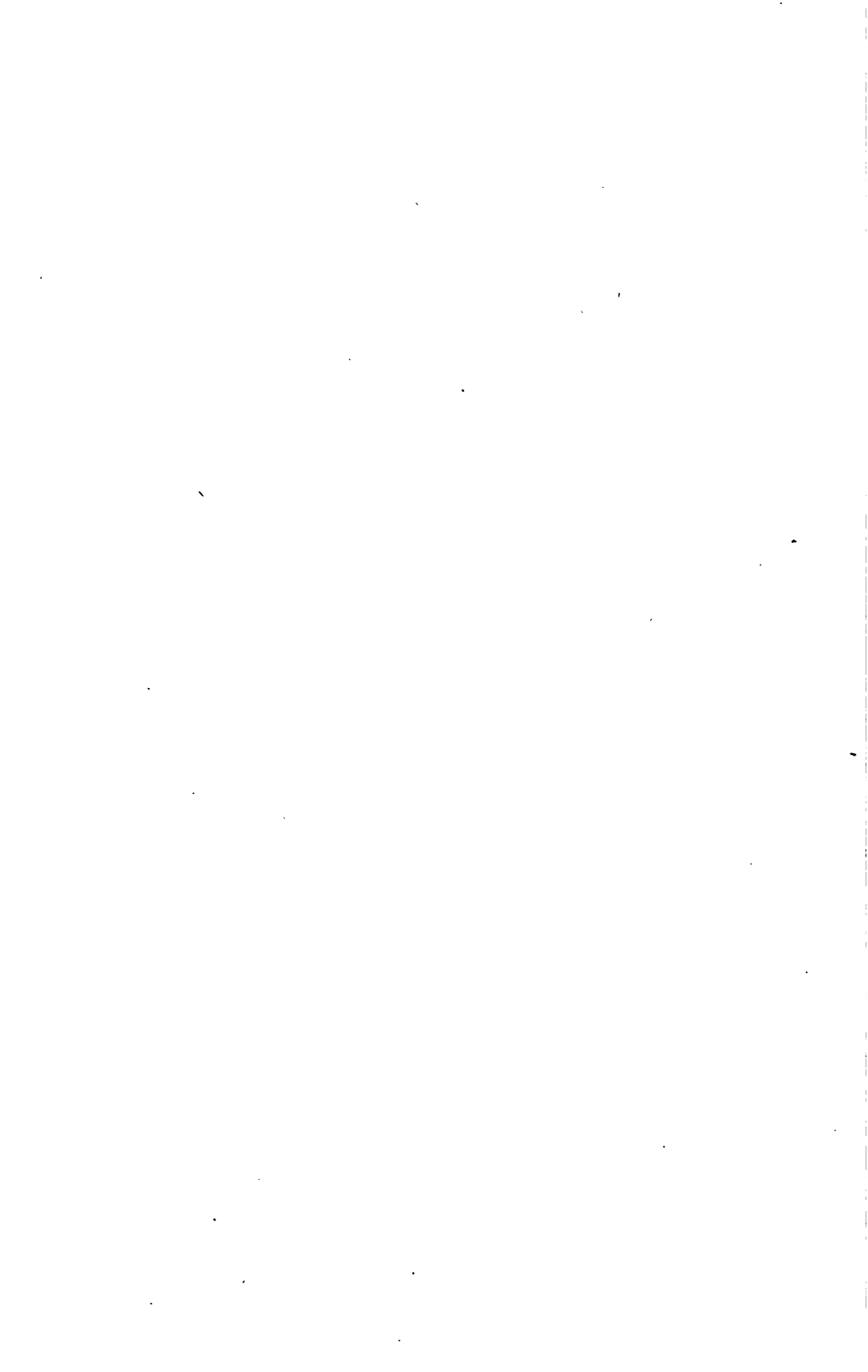
“ Now we would respectfully ask the learned ” critics whether it would not have been quite as well if their article had read as follows : —

*Revision of the Statutes of Massachusetts.*

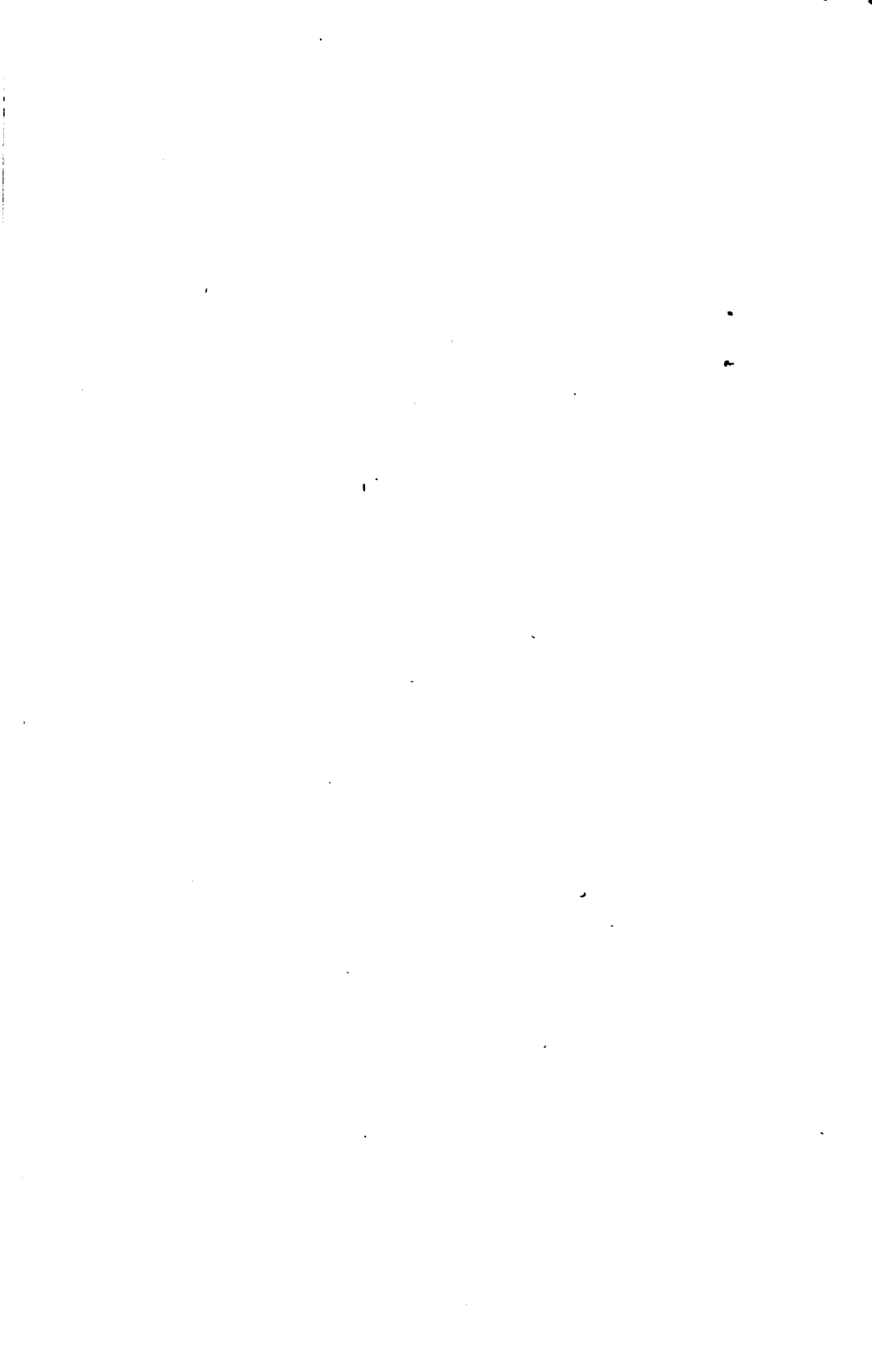
We have examined a few chapters of the report of the commissioners, and find two places in which the words “ property claimed ” are omitted. In one the omission is of no importance. In the other it may possibly affect a few cases, but it is practically of very little consequence.

Such a paragraph would probably have damaged the report, in the end, just about as much as the eighteen pages which they have devoted to the subject ; and would have injured their reputation as critics, and that of their journal, much less.

Some of our readers may think that this reply is unnecessarily minute, and that parts of the foregoing pages are somewhat — particular. They would be so, undoubtedly, were it not for the character of the article which has given rise to them. Our object has been to defend the work of the commissioners, assailed in what was designed to be a contemptuous, but degenerated into a contemptible manner ; and furthermore, to show that the critics have no sufficient qualification for the task they have undertaken, and that the conceit and pretension which led them to make the commissioners welcome to a few elementary observations on language, to accuse them of extraordinary blunders, and to sneer at different portions of their work, might quite as well have been exhibited in some other drawing-room.







1859 Oct 3  
Bk of the Auditor

CAMBRIDGE, Sept. 29, 1859.

JOHN A. GOODWIN, Esq.

DEAR SIR:—From a report of the proceedings of the house of representatives, found in the "Transcript" of last evening, it would appear that in a debate yesterday, certain members of the committee upon the revision of the statutes, "referred to a conversation with the commissioners, wherein they agreed to the verbal amendments, and only objected to their manner of application," and one of them is reported to have "criticised with much severity the course of the commissioners, alleging that they were originally in favor of the verbal amendments, and their 'spite' alone had led them to take a different ground."

Were it not that I have, within a few days past, heard outdoor rumors of similar statements, I should suppose that there must be some mistake in this report of the debate. Of course I cannot know from such a brief report the precise language which was used; but to any allegation that I have at any time been in favor of the verbal amendments reported by the committee upon the revision, or of any considerable portion of those amendments, applied in any manner whatever; and to any assertion that I have in any conversation expressed myself in favor of them, I authorize and request you to give, in my name, a most unqualified denial, whoever may make the statement and wherever it may be made.

Respecting the general manner in which the commissioners should have executed their work, my opinion appears in the Report itself. The commissioners omitted many "superfluous words," changed some words to avoid repetition, and might doubtless have gone somewhat further in these respects if it had seemed to be expedient. The fact that in portions of the work they changed the forms of expression to some extent, has no legitimate tendency to prove that they were of opinion that such changes ought to be made throughout, nor to any extent beyond the changes which were in fact made. I may have said that if I were forming a *code* I would adopt the present tense, but the

authority committed to the commissioners was to revise the statutes "upon the basis, plan and *general form* and method of the Revised Statutes," not to form a code; and under that authority I have never for a moment entertained the opinion that such a change as is proposed by the committee on the revision was expedient, nor said any thing which could authorize any one to suppose that I held such an opinion. The reasons for adopting the present tense, so far as the commissioners adopted it, need not now be discussed. They are stated to some extent in a Memorial by me now before the legislature, and in a report to the senate. It is quite possible that that formula may have been used in some instances with no more cogent reason than a belief that a little variety was desirable in that place. The particular form of expression was not in every instance a matter of grave discussion.

When the reports of the standing committees of the committee of revision came under my observation it appeared that in two or three of them several amendments changing the tenses and others of a mere verbal character were proposed. This was the first notice that I had that there was any intention to make amendments of that character. They were not numerous enough to call for any especial opposition, and yet as there appeared to be no particular reason for proposing them, I attempted to call the attention of the general committee to them in the Report upon chapter 43, drawn up by me, which is quoted in the Memorial before referred to. Those remarks are certainly not of a belligerent character. They assume no dictation. They are expressed, I hope, with a greater degree of courtesy than has been extended to me in the debate of which I am speaking. But I think they serve, distinctly, to show dissent and not approbation. I should suppose that the same might be said of a report to the senate, that the amendments were "unnecessary," without adding for their information that they were inexpedient.

When the matter came before me again it was in the proof sheets of the amendments adopted by the general committee, as prepared for report by the special committee. In the first twenty pages of those sheets no such amendments are to be found. In the sheets embracing chapter 18, now before me, they begin to appear in numbers, [inserted by the special com-

mittee without authority, as seemed afterwards to be admitted,] and on the margin of the same sheets are my marks of dissent, preparatory to the consideration of that chapter with the special committee. But before we reached the examination of that sheet with the committee, amendments of that character were incorporated, by the special committee, into the proof sheet of chapter 13, as I believe, upon which occasion I expressed my dissent somewhat emphatically. It is true I did not "criticise the course of the committee with great severity," having, I trust, a character for common civility which I desire to retain so far as I may; but I said distinctly, in substance, that if such a course of amendment was to be adopted it would deserve my consideration, whether I could consistently act farther with the committee. That was the last time that I saw the members of that body. I understood about that time, that an arrangement was subsequently proposed by which such amendments should not be reported by the committee upon the revision, but that the question of the expediency of making such amendments should be submitted to the legislature, in some other form, for their consideration; the amendments, if they were to be adopted, coming through some one of the standing committees at the adjourned session. I heard that some plan of that kind was adopted by the general committee on the revision. That arrangement was not at my suggestion, nor was I in any way a party to it. The draft of a resolve which was introduced into the debate yesterday, drawn up it was said by Judge Richardson, appears on its face to be a paper to be introduced into the legislature for consideration there. I am informed that it was proposed that the general committee on the revision should report that resolve to the legislature, and recommend its adoption, instead of reporting verbal amendments themselves. It is clear that the resolve is not one which could be passed by the committee. Perhaps I might have been content with some such arrangement, because such a course would prevent the committee upon the revision from sending in such a body of small wares; and I had some faith that if the question of expediency was presented to the legislature in the first instance, no sanction would be given to such a course of amendments. Instead of adhering to this mode, the general committee passed a vote authorizing the special committee to make the changes,

and when I found that this course was settled, I addressed a note to the chairman of the special committee, saying in substance, as nearly as I recollect, that I thought that vote might terminate my connection with the matter. I kept no copy of the communication. It was not in its character very formal or official. The chairman, perhaps, might well regard it as his private property and "put it in his breeches pocket," which I am informed was, in substance, the course which he pursued in relation to it. But when I wrote the note I certainly had not the vanity to suppose that my dissent was of importance enough to be concealed.

The report of the chairman of the general committee drew from me the Memorial which is before the legislature, and since that was presented I had supposed that my opinions were fully understood. However numerous may be my demerits, inconsistency in relation to this matter is not of the number.

It is, I presume, a very easy thing to "criticise with much severity the course of the commissioners" when the criticism is made behind their backs, and in a place where they could not reply if present. If reports of legislative proceedings are always correct, this is not the first time that they have been subjected to that process. There is a word in Dr. Worcester's Dictionary which is sometimes applied to such attacks, but I shall not draw it into use upon this occasion.

Let me say, my dear Sir, that no part of the controversy respecting the Report and proceedings of the commissioners to which I have been a party has been sought by me, but it has all been forced upon me in a most unwelcome manner. I would gladly have avoided it. It has consumed my time, and has not thus far enlarged my faith in the justice of mankind.

With great respect,

Your obedient servant,

JOEL PARKER.

Amesbury

9

1884/5



# OPINION

OF

HON. JOEL PARKER,

EX-CHIEF JUSTICE OF NEW HAMPSHIRE, AND ROYALL PROFESSOR OF THE  
DANE LAW SCHOOL.

ON SOME QUESTIONS INVOLVED IN THE CASE OF

The Proprietors of the Bridges over the Rivers Passaic  
and Hackensack,

against

The Hoboken Land and Improvement Company.



JERSEY CITY:  
JOHN H. LYON & CO., BOOK PRINTERS,  
23 and 25 Montgomery-st.  
.....  
1860.



1861, Jan. 8.

Dear Sir,

I have the honor to acknowledge the receipt of your letter of the 6th inst. and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.

## OPINION OF HON. JOEL PARKER.

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THE PROPRIETORS OF THE BRIDGES OVER THE RIVERS PASSAIC  
AND HACKENSACK, *vs.* THE HOBOKEN LAND AND IMPROVE-  
MENT COMPANY.

I have been furnished with sundry papers relative to the case of the Proprietors of the Bridges over the rivers Passaic and Hackensack *vs.* The Hoboken Land and Improvement Company, pending in the State of New Jersey; among them the opinions of eminent counsel upon several of the questions involved in it.

The facts are so well known to all parties interested, that it is not necessary to restate them. A reference from time to time will be sufficient.

One of the questions presented is, whether the defendants can erect bridges for the passage of their railway trains across the rivers, within the limits specified in the complainants' charter, without a violation of the rights of the complainants; the bridges of the complainants being common toll-bridges.

The question has already come under the consideration of His Honor the Chancellor, and I have been furnished with a report of his opinion upon it. If this opinion had been

designed to be a final determination of the case, I might well feel some delicacy in coming to a different conclusion. But inasmuch as his opinion was formed in view of a further possible, not to say probable, investigation upon appeal, for which His Honor furnished such facilities as were in his power, there can be no hesitation, I suppose, in examining the question with the same freedom as if no judgment had been entered.

It cannot, of course, be said that this is a question upon which an opinion in the affirmative cannot be entertained, but the authorities cited by His Honor will be found, upon examination, to be entitled to much less weight than might at first be supposed. The first is *The Mohawk Bridge Company vs. The Utica and Schenectady Railroad*, 6 Paige's Rep., 554. But no question appears to have arisen in that case which at all affects the present. It seems that the statement of the facts is quite imperfect, and especially lacks precision. From the arguments for the plaintiffs, and from the opinion, it is to be inferred that the Legislature had, in some terms, granted to the plaintiffs a right to erect a toll-bridge, and had provided in the act that no ferry should be established within a certain distance from the bridge, pp., 558-564.

Upon this part of the case Chancellor Walworth said: "The Legislature has indeed protected the Mohawk Bridge Company in the enjoyment of an exclusive right to carry passengers across the river at Schenectady, to a certain extent, by prohibiting others from establishing a ferry within a certain distance from the toll-bridge; but it has not deprived a future legislature of the right to authorize the erection of another bridge within the prescribed limits whenever the public good shall appear to require it." In this he was undoubtedly sustained by sufficient authority. He added:

“Much less is the legislature deprived of the power to provide for the conveyance of freight or passengers from one part of the State to another, by an improvement which was entirely unknown at the time when the grant to the Bridge Company was made.” This, applied, as it is to be, to what precedes it, to wit, to the statement that the prohibition of a ferry was not the prohibition of a bridge, was a conclusion which might serve to strengthen that prior statement if confirmation were necessary.

He then superadded:—“And if that grant had in terms given to the corporation the exclusive right of erecting a toll-bridge across the river at Schenectady, this subsequent grant to the Railroad Company to cross the river with their railway from Schenectady to Utica, and to transport passengers thereon in the ordinary course of their business in the conveyance of travellers from one place to another, would not have been an infringement of the privileges conferred by such prior grant, as the railroad bridge would not be a toll-bridge within the intent and meaning of the grant to the first company.” Now as no such grant was under consideration, and the legislature had made no such grant, it is quite clear that this is a mere *dictum* having no force as a decision of any point in question in that case. So far as appears, that matter was not adverted to in the argument, and it had probably received no especial consideration. And yet, taking the *dictum* according to the terms in which it is expressed, it may by possibility be correct. If the legislature should grant a “toll-bridge” *eo nomine*, and provide in the act “no other toll-bridge should be erected,” I am not prepared to say that this would exclude the erection of any bridge which was not, popularly speaking, a toll-bridge. It might be urged that the corporation had assented to take the limited exclusion of toll-bridges only, prop-

erly so denominated, and that any free bridge, or any other bridge where a toll for passing was not to be taken, was not within the terms, and so not within the exclusion; that against competition of that character the corporation had trusted to the discretion of the legislature.

That is certainly all that Mr. Chancellor Walworth can clearly be understood as asserting.

But that does not touch this case; even with the force of a *dictum*. If it is supposed that he intended to express more, it is open to the suggestion already made, and is only entitled to the weight of a mere impression.

The next citation is *Thompson vs. The New York and Harlem Railroad*, 3 Sandford's Chancery Reports, 625:

The Act of 1790, which in that case authorized the erection of a toll-bridge, provided that it should not be lawful for any person or persons to erect or maintain a bridge or ferry between the two places which were connected by the toll-bridge.

It was held that the act conferring the franchise "was not a covenant or grant that no similar purchase should be conferred on others; and did not restrict the authority of a future legislature to establish a toll-bridge or ferry at the same place;" and that "there is no implication of an exclusive right to a franchise, where the charter or act conferring it, is silent on the subject." The construction of the act, therefore, was, that all persons were prohibited from maintaining a bridge or ferry until the legislature should make a different provision; and the conclusion followed that the legislature might well authorize the erection and use of a railroad bridge.

It is apparent from the authorities cited, and from the course of the argument, that the Assistant Vice-Chancellor considered the question to be, whether the grant of a bridge

without any clause of restraint upon the legislature, or any grant of an exclusive right, would preclude the legislature from granting another bridge so near as to be consequently injurious. That the case is not to be regarded as an authority for the position that a legislature, having stipulated not to authorize a bridge, may notwithstanding authorize a railroad bridge, seems clear from the fact, that His Honor explicitly says, "the decisions of the Chancellor to which I have referred, appear to me to be equally conclusive against any restriction of the power of the legislature to charter a new toll bridge, or to authorize a free bridge in competition with that allowed across the Harlem river by the act of 1790.

Other cases to the same effect will be noticed hereafter. The act of 1790 does not declare that the legislature will not permit another bridge to be erected." He says of the argument, that the railroad bridge, used merely for its appropriate purpose, did not violate or interfere with the franchise granted to the Harlem Bridge Company,—“There is undoubtedly much force in this argument,”—and he comments upon it; but nothing is made to depend upon this argument or suggestion.

The case, therefore, has no tendency to prove that the erection of a railroad bridge in this case would not be within the stipulation of the fifteenth section of the act of November 24, 1790, under the construction which we have seen has been given to that section.

The remaining case cited by the Chancellor is *McKee vs. Wilmington and Raleigh Railroad*, 2 Jones (N. C.) Law Rep. 186, in which the Judge who delivered the opinion seems inclined to the belief that the scope and operation of the provision that, "it shall not be lawful for any person whatever to keep any ferry, build any bridge, or set any person," &c., over the said river, for fee or reward, within

six miles of the bridge granted, under penalty of twenty shillings for every offence, was confined to ferries, bridges and other modes of setting persons and property over the river at that time known and in use, because a different construction was "unreasonable." He said the Court would hesitate long before bringing their minds to the conclusion that the true construction of the contract gave a perpetual monopoly, &c. ; but the Court evidently hesitated to decide the case upon that ground, and did not do so. It is expressly said in the opinion, " we are not, however, under the necessity of putting the decision upon the mere question of construction, for our ' Declaration of Rights ' at once puts an end to any such unreasonable pretension or claim to an *hereditary* and *perpetual* monopoly, as that set up by the plaintiff;" and the decision proceeds upon that ground.

It is perfectly clear that there is nothing which can be regarded as *authority* for the defendants in the foregoing cases.

A similar question arose in *Tucker vs. The Cheshire Railroad*, 1 Foster (N. H.) Rep. 29 ; but the defendants did not dare to trust the case on that point, and the matter was compromised. Now, opposed to the *dicta* in the foregoing cases, is the well considered case, *Enfield Toll Bridge vs. The Hartford and New Haven Railroad*, 17 Conn. Rep. 40, in which the point in question was directly made, fully argued, and constituted one of the principal subjects of consideration ; 6 Paige's Rep. 554, being cited for the defendants. The opinion which was delivered by Mr Chief Justice Williams, one of the most sound and reliable jurists in the country, contains an elaborate discussion of the matter, and the court held that a railroad bridge was within the clause of the plaintiff's charter, providing " that no person or persons should have liberty to build another bridge" be-

tween the places therein named. Mr. Justice Hinman, who at first doubted, was convinced, and concurred.

The case at present under consideration is all the stronger than the one just cited, inasmuch as the provision there was, that no person should have liberty to build "*another bridge*," whereas in this case the language is, "that it shall not be lawful for any person to erect *any other bridge*," which is certainly the more comprehensive phraseology. There is more room for argument that "another bridge" means a bridge of the same character, than there is for thus limiting the scope of the terms "any other bridge." As the Chancellor's decision is appealed from, the opinion which he has expressed cannot be said as yet to have the character of an *authority*.

The weight of authority, therefore, is clearly with the complainants. See also, Redfield on Railways, 502, Sec. 6, note 3.

But the complainants' case on this point is by no means dependent on authority; nor has the case in Connecticut exhausted the argument. Considering this question upon principle, the true construction of the clause of exclusion found in the fifteenth section of the act of 1790, is to be determined, as in other cases, by ascertaining the intent and meaning of the legislature, as derived from the words, subject-matter, context, and spirit and reason of the law from which the complainants obtained their rights. Undoubtedly the intention of the legislature in 1790 was to provide for a great public want, then existing, by securing the erection of bridges, by means of which persons and property could pass over the rivers mentioned. For this purpose, they granted a right to erect bridges, and as the mere grant of the right to erect was not deemed sufficient to secure the object, they inserted the fifteenth section, and provided for a subscrip-



tion, a lottery, &c. The section was unquestionably inserted to insure to the lessees or proprietors of the bridges, who were afterwards incorporated, all the profits which could be derived from the transit of persons and property over bridges across the rivers, within the limits prescribed. There is no other sufficient reason which can be suggested for its introduction. It was held out as a consideration to induce persons to expend their money in the erection of the bridges, and it seems to have been an effective inducement for that purpose.

Nothing is made to depend upon the particular structure of the bridges to be built, or of any other bridges which might be proposed, nor upon the particular mode of using any of them.

It is a bridge which is granted. It is "any other bridge" which is excluded. The subject matter is security against a diminution of profits through the erection of "any other bridge."

The spirit and reason of the exclusion, then, is to forbid the erection of *any bridge* which would operate to deprive the complainants of the profits to be derived from the possessions of the only bridges by means of which the rivers could be crossed within the limits named. Secured in this, they were content to provide for the public exigencies, taking the risk of competition by any means of transit except a bridge.

As the defendants are proposing to erect *bridges*, by means of which there may be a transit of persons and property across the rivers within the limits named, to the diminution of the profits of the complainants, what interferes with the conclusion that the attempt is against the words, subject-matter, context, spirit and reason of the complainants' exclusive right to have bridges there, except so far as they consented to the erection of other bridges?

The reason suggested for escaping such conclusion is, that the bridges proposed to be erected by the defendants are in some particulars different in their structure from those of the complainants, and are to be used in a different manner, to some extent, in accomplishing the transit of persons and property over them; and that this different mode of passage over them, by which the bridges of the defendants are to be used, was not known when the complainants' rights were granted.

All this may be true, and yet the competition may be as severe, the diminution of profits as certain, and the injury to the complainants may be even greater, by the erection and use of such bridges, than any which could arise by a bridge to be used precisely after the manner in which the complainants' bridge is used.

There may be ruinous competitions aside from the use of a similar thing in the same manner, or even from the use of a similar thing in a different manner. A railroad company competes with a canal company, or with the ordinary common carrier by horse power, and even with the individual who transports his own produce and that of his neighbors to the market; and the competition is none the less close, nor less injurious to the canal company, because at the time when that company expended their capital in providing that great facility for transportation, the mode of transportation by railroad engines and cars was not known or thought of.

As there may be competition, and diminution of profits, by modes not known at the time when the first facilities were provided, so there may be contracts of prohibition and grants of exclusion, which reach, cover, and forbid, the use of modes of competition not known or discovered at the time of the contract or grant.

And if there be words of exclusion which fairly admit of

it, the reasonable interpretation is, that they extend to such possible modes, for such new modes were precisely those against which it was most necessary to have such provisions. The rule that in cases of doubt the construction is to be against the grantee does not apply in such case.

The fact, therefore, that the mode of competition is new, so far from furnishing a reason for a construction which would take it out of the exclusion, operates directly and strongly the other way. If, prior to the introduction of steam navigation upon the Hudson river, a party owning a vessel navigating that river, had sold her, and covenanted with the vendee that he would not thereafter, for the term of twenty years, be concerned in the ownership or navigation of any vessel upon that river, it would be but a sorry plea for him, he having purchased and run a steamboat on that river within the twenty years, to say, that the navigation of a vessel by fire and steam was unknown at the time of his sale and covenant, and that it was not therefore within the scope of his obligation. The violation of the covenant would be all the worse, inasmuch as the navigation by steam would enable him to compete with the vendee much more successfully than he could have done by the ordinary modes of navigation, in use at the time of the covenant. Just so of the grant of the bridges, with a covenant not to grant any other bridge, or the grant of a bridge with an exclusive right, which is the same thing so far as this principle is concerned.

A grant of another bridge of the same kind, within the limits, would be a clear violation; but it would only enable the second grantee to compete on equal terms. A grant of another bridge which can be used with steam power, connected with a railroad and locomotive power, which gives increased speed and increased facilities, constitutes a much

more grave interference with the bridge first granted, and the injury may be tenfold greater. And the thing granted is a *bridge*, and the thing constructed in pursuance of the grant, and which is the means of interference and injury is a *bridge*. It may be a bridge with rails instead of planks, but it is notwithstanding a bridge. It may be passed by locomotives instead of coaches, but that does not take from it the character of a bridge, or modify that character. It may be used by the corporation which erects it, as a common carrier of persons and property, instead of being used by the carriages and vehicles of different members of the community to transport themselves and their property, but the persons and property transported by the corporation are conveyed over a bridge.

The Assistant Vice-Chancellor, in the remarks which he made in *Thompson vs. The New York and Harlem Railroad*, 3 Sandford's Chancery Rep., 660, lost sight, for the time being, of the undeniable fact, that a *bridge* is a *bridge*.

He said, "The railroad bridge, *as such*, is incapable of being used for the passage of vehicles, animal or foot passengers, for whose passage the complainants are entitled to receive toll;" and "On the other hand, the complainants' bridge has not the capacity to pass over the Harlem River any of the Railroad Company's engines, or their trains or cars drawn by such engines.

"And if the complainants were to lay down a suitable railway track, and strengthen their bridge so that the engines and trains of the defendants might cross it, there is nothing in their charter which would warrant them in exacting toll from the defendants." And thereupon he added:

"This demonstrates that the franchise granted to the defendants, is not the same as that vested in the complainants; nor is there such a similarity between them as renders the

one an interference with the other, in the sense in which a new bridge or a ferry interferes with a prior one established at the same point." We may grant the premises as above stated, but the last clause, if intended to express a conclusion, that a grant of a railroad bridge was not within the provision of the first act, that "it should not be lawful for any person or persons to erect or maintain a bridge or ferry" between the two places named, is a very perfect *non sequitur*. Grant that the railroad bridge, *as such*, was incapable of being used by foot passengers and vehicles, for whose passage the toll-bridge company were authorized to demand tolls; and that the bridge of the latter company was not adapted to the passage of engines and cars, and if made so, that there was no provision for a toll on such vehicles. This in no way proves that the grant to the Railroad Company was not a franchise to build a *bridge* across the river, by means of which persons and property, animals and vehicles were to cross the stream. And therein consists the essential similarity between the two. The one was designed to accomplish the same general purpose as the other. The particular manner in which the passage should be made over the bridges—whether by steam, or horse, or foot power—whether by the agency of common carriers, or of the parties themselves who desire to cross—whether upon rails or upon planks, laid upon the timbers of the bridge, are matters in no sense essential to the question, which, at this point, is the only question, to wit, whether the legislature did not intend to give the exclusive right of providing a bridge for the transit of passengers and freight across the river by means of a bridge.

Suppose the complainants should provide trucks running on rails, with platforms upon which persons and vehicles might be transported across their bridges, and should by

means of a stationary engine at each end, transport such passengers and vehicles as should take their places on the platforms ; or should do the same thing by means of locomotives, would their bridges be any the more or less *bridges*; or could there be any question whether or not they could charge the customary tolls? Whether they could in such modes obstruct people from passing in the ordinary way would be one thing. Perhaps not. But whether it would not be a lawful mode of using their bridges, by the corporation, for the transit of passengers and freight across the river, so that they could lawfully take the ordinary tolls of those who saw fit to use the new accommodation, would be another and a different question, and one respecting which it would seem that there could not be a reasonable doubt.

It is not then the particular mode by which the transit is made across the bridge, which determines the right.

The Assistant Vice-Chancellor, in the case before cited, labors somewhat to show that a diminution of profit, consequent upon the opening of new avenues and new modes of inter-communication, does not of itself, give any title to redress or compensation ; which is undoubtedly true, so long as no stipulation or grant is infringed.

And he adds, " If, then, this progressive spirit of the age, have developed and matured a mode of conveying passengers and freight from place to place, across rivers and morasses, which was unknown in 1790, can there be any doubt that the legislature, in the exercise of its sovereign duty to provide ways for the use of the people, may authorize the construction and use of such new invention, although the necessary consequence may be that the prior modes of conveyance will be superseded, and those who are profitably engaged in their pursuit, will be subjected to the loss of their business and capital ?

"I think the right and the duty of the legislature in such a case is too clear to be questioned, and that those who are enjoying franchises previously conferred, which are thereby rendered worthless, stand in no worse position, and are no more entitled to sympathy or compensation, than the numerous classes of mechanics and other individuals who are daily subjected to great losses and sacrifices by new inventions and improvements superseding and destroying those in profitable use." pp. 661-662.

This, also, is very true, under the same conditions that no prior stipulation or grant is infringed.

If, for instance, the defendants sought to transport passengers and freight over the rivers and morasses by means of a balloon, the transportation would violate no right of the complainant. A tunnel under the rivers may be supposed to be somewhat better adapted to a connection with their railroad; and although a railroad and tunnel might greatly diminish the profits of the complainants, it would not infringe their rights, inasmuch as a tunnel is not a bridge.

The complainants have not guarded themselves against such modes of competition, and have no covenant nor exclusive right, nor franchise which would be infringed thereby. But they have, either a covenant that no other *bridge* shall be erected across either of the rivers, within the limits specified, or an exclusive right to maintain bridges within those limits; and in my opinion, the erection of another bridge within those limits, will be an infringement of their rights, whatever may be the particular manner by which a transit is made across it.

Furthermore, the defendants are not entitled to assume that the complainants have no exclusive right, and acting upon that assumption, to proceed as though no such right existed. They can proceed only according to the supplement to their

charter, which authorizes them to construct a railroad, and this provides in the fifth section, that if the defendants shall fail to agree with the person or persons, *corporation* or corporations, *claiming to own*, or owning any *right, privilege, franchise, or property*, for the exercise and appropriation or purchase thereof, or so much thereof as may be necessary, &c.; application shall be made in writing by the defendants' company, by its president or other officers, for the appointment of commissioners, &c.

The complainants claiming the exclusive right, the defendants must first apply for the appointment of commissioners. Any attempt to construct a bridge within the exclusive limits claimed, other than in the mode, and under the provisions of that section, entitles the complainants to maintain a bill for an injunction, without any inquiry at that stage, into the merits of their claim.

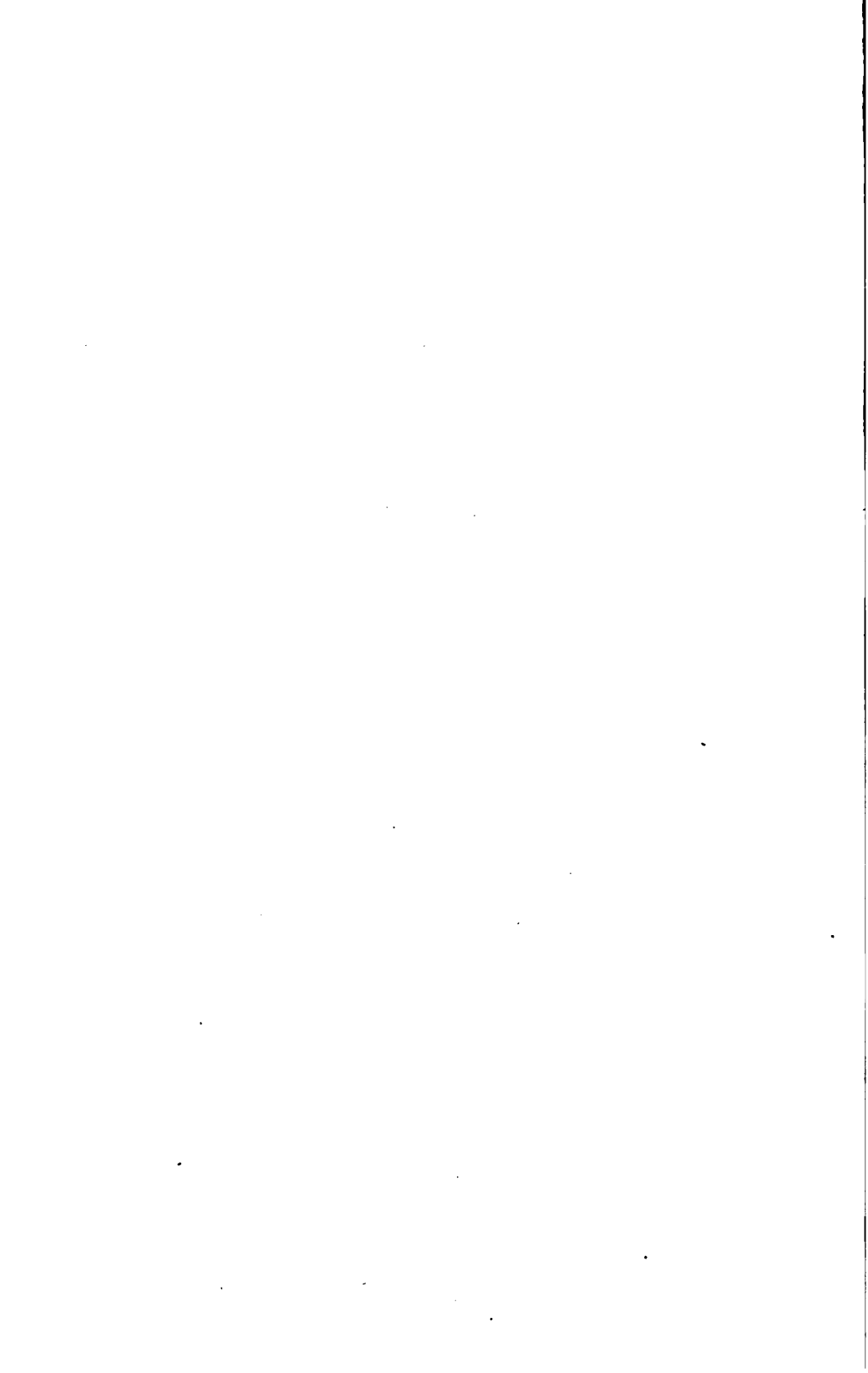
But this is not all. The reservation at the close of the first section of the defendants' supplemental charter seems to contain a legislative recognition of the right of the complainants to compensation; and the defendants by their acceptance of the grant, are precluded from contesting the right of the complainants in this particular.

If that is not the true construction of that clause, it seems to be of no effect, and a well known principle of law forbids such a result.

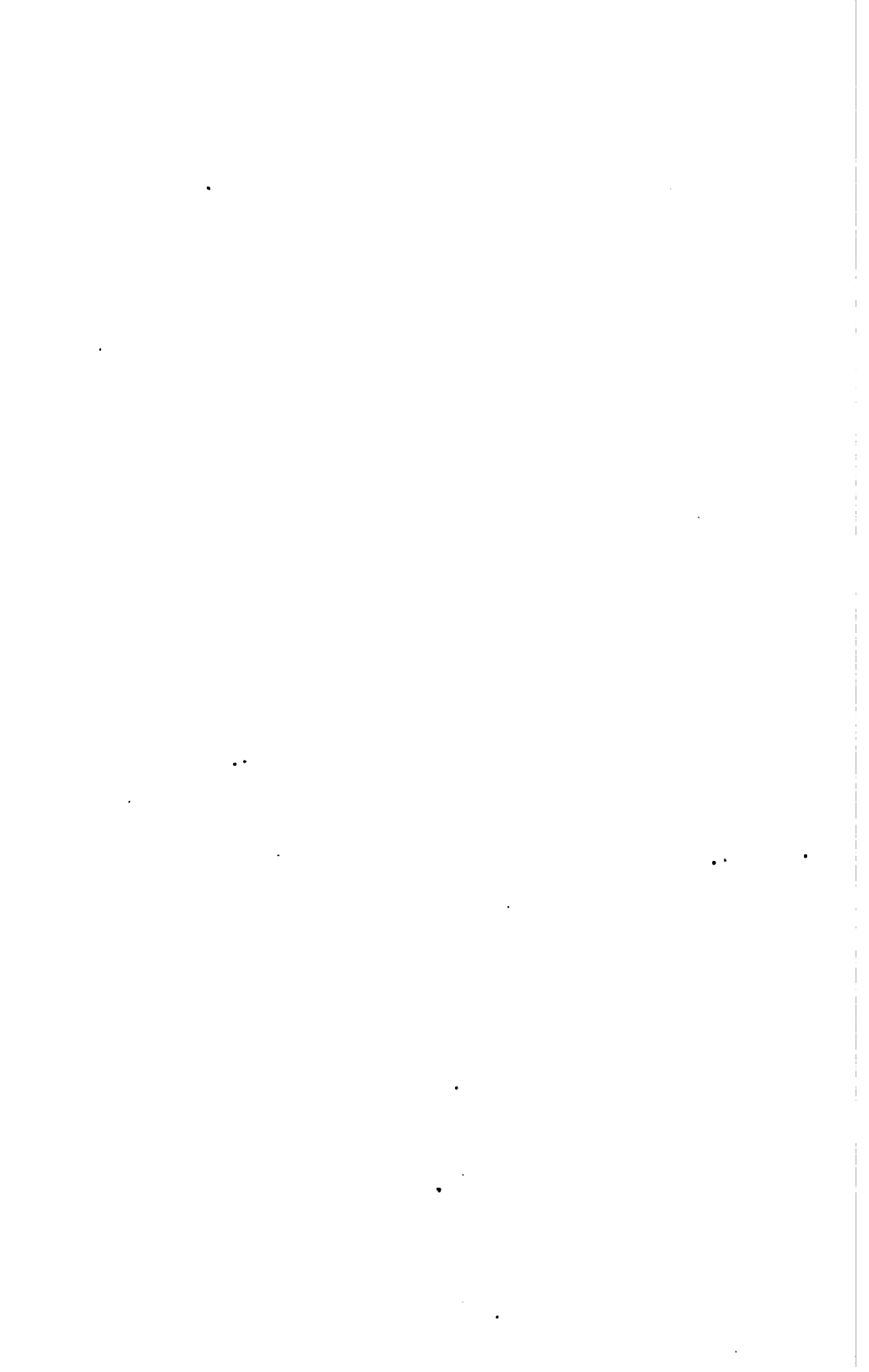
JOEL PARKER.

CAMBRIDGE, MASS., Nov. 6, 1860.

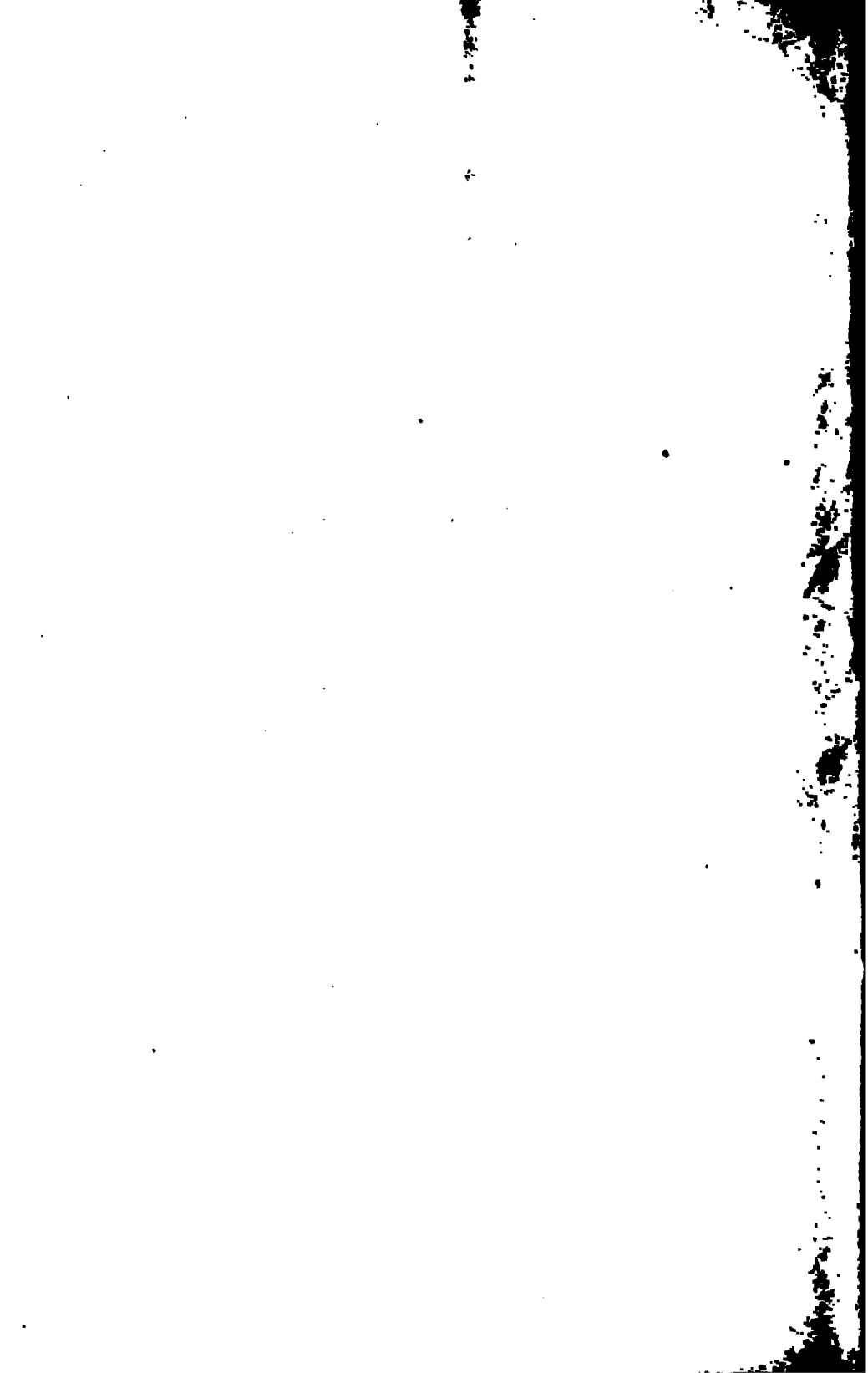












*in Binney*  
*H. W. Longfellow*  
*with respects*  
*J. Pa*

HABEAS CORPUS,

AND

MARTIAL LAW.

A REVIEW

OF THE OPINION OF CHIEF JUSTICE TANEY IN THE CASE  
OF JOHN MERRYMAN.

BY JOEL PARKER.

CAMBRIDGE:  
WELCH, BIGELOW, AND COMPANY,  
PRINTERS TO THE UNIVERSITY.

1861.

**MEMORANDUM.** — To the students in the Law School of Harvard College, June 11, 1861, the argument contained in the following pages will not be novel, as it was then presented to their consideration, in a Lecture delivered by the author as Royall Professor of Law in that Institution.

It has since been revised, and is published in the October number of the North American Review.

**CAMBRIDGE,** *October 1, 1861.*

## HABEAS CORPUS AND MARTIAL LAW.

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THE opinion of Chief Justice Taney, in the case of John Merryman, has necessarily attracted much attention. Several of the accompanying circumstances have given it unusual prominence. The case was one, as most of our readers well know, in which Merryman, being held as a prisoner at Fort McHenry, the head-quarters of General Cadwalader, then in command of the military department in which the fort is situated, applied to Chief Justice Taney, the head of the judiciary of the United States, for a writ of *habeas corpus*, in order that he might thereby be brought before the Chief Justice and delivered from imprisonment, upon the ground that it was without lawful warrant, unjust, and oppressive. Merryman was arrested by a military force, without any warrant from a magistrate, on charges of treason and rebellion, founded upon certain acts done by him at, or immediately after, the attack by a mob upon the Sixth Regiment of Massachusetts Volunteers, in its passage through Baltimore; the mob being incited to violence through the agency of secessionists inhabiting that city, and the regiment being on its way to Washington to sustain the government of the United States, then gravely menaced by the insurrection in the Southern States,—the capital itself being threatened by the leaders of the insurrection. Troops from Pennsylvania, proceeding to Washington for the same purpose, were attacked and turned back by the same mob. It was alleged, especially,



that Merryman had participated in the destruction of the railroad and bridges, with the design of preventing other troops from reaching the capital by the route through Baltimore. Fort McHenry, in the immediate vicinity of Baltimore, was at the time of the arrest held and occupied for the purposes of the war, which had then just commenced, and was regarded as a very important military post, serving among other purposes as a check — and perhaps for the time as the only effectual check — upon the disaffected part of the population of Baltimore.

The further facts which led to the issuing of the writ of *habeas corpus*, as prayed for, are stated by the Chief Justice, in the opinion delivered by him, as follows: —

“The petition presents the following case. The petitioner resides in Maryland, in Baltimore County. While peaceably in his own house with his family, he was, at two o'clock on the morning of the 25th of May, 1861, arrested by an armed force, professing to act under military orders. He was then compelled to rise from his bed, taken into custody, and conveyed to Fort McHenry, where he is imprisoned by the commanding officer, without warrant from any lawful authority.

“The commander of the fort, General George Cadwalader, by whom he is detained in confinement, in his return to the writ, does not deny any of the facts alleged in the petition. He states that the prisoner was arrested by order of General Keim, of Pennsylvania, and conducted as a prisoner to Fort McHenry by his order, and placed in his (General Cadwalader's) custody, to be there detained by him as a prisoner.

“A copy of the warrant or order under which the prisoner was arrested was demanded by his counsel, and refused. And it is not alleged in the return that any specific act, constituting an offence against the laws of the United States, has been charged against him upon oath, but he appears to have been arrested upon general charges of treason and rebellion, without proof, and without giving the names of the witnesses, or specifying the acts which, in the judgment of the military officer, constituted these crimes. And having the prisoner

thus in custody upon these vague and unsupported accusations, he refuses to obey the writ of *habeas corpus*, upon the ground that he is duly authorized by the President to suspend it.

"The case, then, is simply this. A military officer, residing in Pennsylvania, issues an order to arrest a citizen of Maryland, upon vague and indefinite charges, without any proof, so far as appears. Under this order, his house is entered in the night, he is seized as a prisoner and conveyed to Fort McHenry, and there kept in close confinement. And when a *habeas corpus* is served on the commanding officer, requiring him to produce the prisoner before a Justice of the Supreme Court, in order that he may examine into the legality of the imprisonment, the answer of the officer is that he is authorized by the President to suspend the writ of *habeas corpus* at his discretion, and, in the exercise of that discretion, suspends it in this case, and on that ground refuses obedience to the writ.

"As the case comes before me, therefore, I understand that the President not only claims the right to suspend the writ of *habeas corpus* himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him.

"No official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the President claimed this power, and had exercised it in the manner stated in his return. And I certainly listened to it with some surprise, for I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands that the privilege of the writ could not be suspended, except by act of Congress."

From the concluding part of the opinion, it appears that the Chief Justice not only denies the right of the President to suspend the writ of *habeas corpus*, and the right of General Cadwalader to decline compliance with the command of the writ requiring him to appear with the prisoner and show the cause of the detention, but he also denies the right of the military authority to make searches, seizures, and arrests without warrant; and he insists that "great and fundamental

laws, which even Congress itself could not suspend, have been disregarded and suspended, like the writ of *habeas corpus*, by a military order, supported by force of arms." We quote this part of the opinion, as it has an important bearing upon the reasoning of the Chief Justice.

If the arrest might be made by the military authority, without warrant, then it will probably be admitted that the same authority, on making return of the nature of the arrest and detention, may decline to produce the prisoner upon the writ of *habeas corpus*.

"But the documents before me show that the military authority in this case has gone beyond the mere suspension of the privilege of the writ of *habeas corpus*. It has, by force of arms, thrust aside the judicial authorities, and officers to whom the Constitution has confided the power and duty of interpreting and administering the laws, and substituted a military government in its place, to be administered and executed by military officers; for at the time these proceedings were had against John Merryman, the District Judge of Maryland, the Commissioner appointed under the act of Congress, the District Attorney, and the Marshal, all resided in the city of Baltimore, a few miles only from the home of the prisoner. Up to that time there had never been the slightest resistance or obstruction to the process of any court or judicial officer of the United States in Maryland, except by the military authority. And if a military officer, or any other person, had reason to believe that the prisoner had committed any offence against the laws of the United States, it was his duty to give information of the fact, and the evidence to support it, to the District Attorney; and it would then have become the duty of that officer to bring the matter before the District Judge or Commissioner, and, if there was sufficient legal evidence to justify his arrest, the Judge or Commissioner would have issued his warrant to the Marshal to arrest him, and, upon the hearing of the party, would have held him to bail, or committed him for trial, according to the character of the offence, as it appeared in the testimony, or would have discharged him immediately, if there was not sufficient evidence to support the accusation. There was no danger of

any obstruction or resistance to the action of the civil authorities, and therefore no reason whatever for the interposition of the military.

"And yet, under these circumstances, a military officer, stationed in Pennsylvania, without giving any application to the District Attorney, and without any information to the judicial authorities, assumes to himself the judicial power in the District of Maryland, undertakes to decide what constitutes the crime of treason or rebellion, what evidence (if, indeed, he required any) is sufficient to support the accusation and justify the commitment, and commits the party, without having a hearing even before himself, to close custody in a strongly garrisoned fort, to be there held, it would seem, during the pleasure of those who committed him.

"The Constitution provides, as I have before said, that 'no person shall be deprived of life, liberty, or property, without due process of law.' It declares that 'the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' It provides that the party accused shall be entitled to a speedy trial in a court of justice.

"And these great and fundamental laws, which Congress itself could not suspend, have been disregarded and suspended, like the writ of *habeas corpus*, by a military order supported by force of arms. Such is the case now before me; and I can only say, that, if the authority which the Constitution has confided to the Judiciary Department, and judicial officers, may thus, upon any pretext and under any circumstances, be usurped by the military power at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty, and property at the will and pleasure of the army officer in whose military district he may happen to be found.

"In such a case, my duty was too plain to be mistaken. I have exercised all the power which the Constitution and laws confer on me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the

authority intended to be given him. I shall therefore order all the proceedings in this case, with my opinion, to be filed and recorded in the Circuit Court of the United States for the District of Maryland, and direct the Clerk to transmit a copy, under seal, to the President of the United States. It will then remain for that high officer, in fulfilment of his constitutional obligation 'to take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the United States to be respected and enforced."

The liberty of the subject, and the writ of *habeas corpus* as the means of protecting that liberty from unlawful interference, have long been the pride and boast of Englishmen; and the American people, as is abundantly shown in the Constitution and laws of the United States, and of the several States, have been not less jealous for the one, or less tenacious of the other. It is apparent, therefore, that whatever addresses itself to the popular mind as a vindication of the right of personal freedom against oppression in any of its forms, must meet a ready and hearty approval; and if the Chief Justice, as is undoubtedly the fact, has failed to secure the support of the people in the assertion of his right to deliver Merryman from his imprisonment, it must be because there were circumstances of no ordinary character involved in the case, which deprived the party imprisoned of the popular sympathy, and led to grave doubts whether the principles of law relied on by the judicial magistrate ought to, or do in fact, govern cases of that character.

Upon a superficial examination of the case, as stated by the Chief Justice, it is not surprising, perhaps, that he should have come to the conclusion that the return to the writ was insufficient. But there is no case which in all its circumstances comes up to this, and there are certain matters of law and fact bearing upon it, and appearing to deserve great weight, which do not seem to have presented themselves to his mind. He does not discuss the question how far the pro-

visions of the Constitution which he cited in the latter part of the opinion have reference to a state of actual war existing in the country,—how far they may be modified or controlled in their operation by other provisions of the Constitution which in a state of war may have a bearing upon the case,—nor how far the authorities which he cites have a just application to the facts which he must have known were not only existing, but which had a controlling influence in producing the case before him.

It may be thought that the question, whether General Cadwalader might not lawfully decline to obey the command of the writ, or suspend its operation, because it would require him to abandon for the time being the performance of his military duties, and because he held the prisoner under military or martial law, was not presented to the Chief Justice by the return, which stated that the President had authorized a suspension of the writ of *habeas corpus*. But if the return did not in terms present that question to him, it was, notwithstanding, before him, and he passed upon it; for, after stating that Mr. Jefferson did not claim the power to suspend the writ, but referred the matter to Congress, he said in the opinion:—

“Having, therefore, regarded the question as too plain and too well settled to be open to dispute, if the commanding officer had stated that upon his own responsibility, and in the exercise of his own discretion, he refused obedience to the writ, I should have contented myself with referring to the clause in the Constitution, and to the construction it received from every jurist and statesman of that day, when the case of Burr was before them. But being thus officially notified that the privilege of the writ has been suspended under the orders and by the authority of the President, and believing, as I do, that the President has exercised a power which he does not possess under the Constitution, a proper respect for the high office he fills requires me to state plainly and fully the grounds of my opinion, in order to show that I have not ventured to question the legality of his act without a careful and deliberate examination of the whole subject.”

It seems, therefore, upon his own showing, that if General Cadwalader had made a return that he claimed to hold the prisoner by the general law martial, which suspended the *habeas corpus*, and rendered his military duties and obligations inconsistent with a compliance with the requirements of the writ, the Chief Justice would have disposed of the case without arguing the question.

There are some cases which have a tendency to support his conclusion. How far they can justify it, we shall see as we proceed. We propose at this time to follow out the investigation thus indicated.

If it were admitted that the same rules are applicable to the issue and determination of the *habeas corpus* in time of war as those which govern the subject in time of peace, then it must also be admitted that the opinion of the Chief Justice is well sustained; but if it shall appear that war brings with it its own rules, prescribing the powers and duties of military commanders, and their relations to persons within their military jurisdiction, then his reasoning may fail in its application to the case before him, and the opinion may be shown to have no sufficient foundation.

It may be well in the first place to consider briefly the nature and character of the writ of *habeas corpus*, as deduced from its early history, although there is very little in its practical application in England which can serve to throw light upon the present questions.

It is said that there are various kinds of the writ of *habeas corpus*; but it might perhaps with greater precision be said, that the writ is used for several different purposes, and the terms which designate the different purposes have been applied as designations for different writs; as, for instance, the *habeas corpus ad respondendum*, where the body of the party is brought into court that he may answer to what is charged against him; the *habeas corpus ad testificandum*, where a

party imprisoned is brought in to testify as a witness, and other cases furnishing similar descriptions.

“But the great and efficacious writ in all manner of illegal confinement,” says Blackstone, “is that of *habeas corpus ad subjiciendum*, directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his capture and detention, *ad faciendum, subjiciendum, et recipiendum*, to do, submit to, and receive, whatsoever the judge or court awarding the writ shall consider in that behalf. This is a high prerogative writ, and therefore, by the common law, issuing out of the King’s Bench not only in term time, but also during the vacation by a *fiat* from the chief justice or any other of the judges, and running into all parts of the king’s dominions; for the king is entitled at all times to have an account why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted.” \*

There seems to be no authentic account of the issue of the writ until long after Magna Charta, although it is said to be of right by the common law, which may be true in the sense that it has its foundation in the principles of the common law.

Coke says that “Magna Charta was for the most part declaratory of the principal grounds of the fundamental laws of England, and for the residue it is additional to supply some defects of the common law.” † But the Great Charter did not in terms provide for or recognize any right to this particular remedy. The provisions which declare the right of the subject, and perhaps serve to sustain this writ as an appropriate remedy for any unlawful restraint of his person, are, —

*“Nullus liber homo capiatur, vel imprisonetur, aut disseisietur, de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut ullagetur, aut exuletur, aut aliquo modo destruat, nec super eum ibimus, nec super eum mittimus, nisi per legale iudicium parium suorum, vel per legem terræ.*

\* 3 Blackstone’s Commentaries, 131.

† 2 Inst. 66 *et seq.*



“ *Nulli vendemus, nulli negabimus, aut differemus, justitiam vel rectum.*”

As translated in Coke, these provisions read : —

“ No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed ; nor will we pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land.

“ We will sell to no man, we will not deny or defer to any man either justice or right.” \*

There have been some differences of translation not material to the present discussion.

That these provisions of the Great Charter did not secure to the subject deliverance from imprisonment at the will of the crown, even in times of peace, and that the general principles of the common law, as then administered, furnished no better security, is apparent from the fact that in 1627, more than four centuries afterward, a writ of *habeas corpus* was issued in the case of John Hampden and others, to which the Warden of the Fleet returned, that they were detained by a warrant from the Privy Council, that no particular cause was assigned, but that they were committed by the special command of his Majesty ; and the court held this a sufficient return. Undoubtedly the decisions of the judicial tribunals at that period, upon subjects involving the prerogatives of the crown, cannot be regarded as of high authority. This case led to divers proceedings in Parliament condemnatory of the decision ; to the Petition of Right, for the better security of the liberty of the subject ; and to the *habeas corpus* act, in the thirty-first year of Charles II., which recited that “ great delays have been used by sheriffs, jailers, and other officers, to whose custody any of the king’s subjects have been committed for criminal or supposed criminal matter, in making returns of writs of *habeas*

*corpus* to them directed," and then enacted, in substance, that whensoever any person should bring a writ of *habeas corpus*, directed to any sheriff or other person, for any person in his custody, the officer should, within three days after service of the writ in the mode designated, (except in certain cases enumerated,) upon payment of charges and security given, bring, or cause to be brought, the body of the party so committed or restrained, unto or before the Lord Chancellor, according to the command thereof, and certify the cause of his commitment. There were divers provisions regulating the subsequent proceedings. It has been said that this statute was designed to secure the benefit of the writ, rather than to extend its operation, one great object being to insure the performance by the judges of their duty.

Mr. Chief Justice Taney says in his opinion : —

"The right of the subject to the benefit of the writ of *habeas corpus*, it must be recollected, was one of the great points in controversy during the long struggle in England between arbitrary government and free institutions, and must therefore have strongly attracted the attention of statesmen engaged in framing a new, and, as they supposed, a freer government than the one which they had thrown off by the Revolution. For, from the earliest history of the common law, if a person was imprisoned, — no matter by what authority, — he had a right to the writ of *habeas corpus* to bring his case before the King's Bench ; and if no specific offence was charged against him in the warrant of commitment, he was entitled to be forthwith discharged ; and if any offence was charged which was bailable in its character, the court was bound to set him at liberty on bail. And the most exciting contests between the crown and the people of England from the time of Magna Charta were in relation to the privilege of this writ, and they continued until the passage of the statute of 31st Charles II., commonly known as the great *habeas corpus* act.

"This statute put an end to the struggle, and finally and firmly secured the liberty of the subject from the usurpation and oppression of the executive branch of the government. It nevertheless conferred no

new right upon the subject, but only secured a right already existing. For, although the right could not be justly denied, there was often no effectual remedy against its violation. Until the statute of the 13th of William III. the judges held their offices at the pleasure of the king, and the influences which he exercised over timid, timeserving, and partisan judges, often induced them, upon some pretext or another, to refuse to discharge the party, although he was entitled to it by law, or delayed the decisions from time to time, so as to prolong the imprisonment of the persons who were obnoxious to the king for political opinions, or had incurred his resentment in any other way.

“The great and inestimable value of the *habeas corpus* act of the 31st Charles II. is, that it contains provisions which compel courts and judges, and all parties concerned, to perform their duties promptly, in the manner specified in the statute.”

If by this the Chief Justice refers to imprisonment for alleged offences in time of peace, and to detentions having no connection with military operations in time of war, it may be true, theoretically; but it is quite clear, that neither Magna Charta nor the common law prescribes rules to govern the conduct of a war, or professes to set forth the principles which in time of war shall regulate the military service of the country; and we have found no case in England in which the writ of *habeas corpus* has been used, in time of war, to deliver from any detention by military authority, which detention had its origin in causes and proceedings connected with the war. So far from its being true that “from the earliest history of the common law, if a person was imprisoned, no matter by what authority, he had a right to the writ of *habeas corpus*, to bring his case before the King’s Bench, and if no specific offence was charged against him in the warrant of commitment, he was entitled to be forthwith discharged,”—and that the statute of Charles II. secured such right already existing,—it is a fact, that, more than a century after the passage of the act, “a gentleman having been impressed before the commissioners, under a pressing

act passed in the preceding session, and confined in the Savoy, his friends made application for a writ of *habeas corpus*, which produced some hesitation and difficulty; for according to the above statute, the privilege relates only to persons committed for criminal or supposed criminal matter." Before the question could be determined, he was discharged on an application to the Secretary at War. This case being supposed to show a defect in the statute of Charles II., a bill was introduced into Parliament, in 1757, for giving a more speedy remedy to the subject upon the writ of *habeas corpus*. The bill was passed by the House of Commons, but was thrown out on its second reading in the House of Lords, principally, it would seem, through the agency of Lord Mansfield. He made a speech upon it in June, 1758, of which Horace Walpole said, "I am not averse to own that I never heard so much argument, so much sense, so much oratory united." In the course of this speech, according to a report of Dr. Birch, cited by Lord Campbell, Lord Mansfield, among other things, said, "that the writ of *habeas corpus* at common law was a sufficient remedy against all these abuses which this bill was supposed to rectify." But such evidently was not the view of Lord Campbell, who says: "I am concerned to say that Lord Mansfield, from whom better things might have been expected, stirred up a furious opposition to this bill, and threw it out." And Horace Walpole adds: "Nor did I ever know how true a votary I was to liberty, till I found I was not one of the number staggered by that speech."\*

If the statute of Charles II. conferred no new right upon the subject, but only secured a right already existing, as is said by Mr. Chief Justice Taney, and has been said by others, it is quite clear that the common-law right to the writ did not extend to such a case; for while the bill was before

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\* Lord Campbell's *Lives of the Chief Justices*, Vol. II. pp. 453, 454, and note.

the House of Lords, that body proposed ten questions to the Judges, the ninth question being, "Whether the said statute of 31 Car. II., and the several provisions therein made for the immediate awarding and returning the writ of *habeas corpus*, extend to the case of any compelled against his will in time of peace to enter into the land or sea service without any color of legal authority, or to any case of imprisonment, detainer, or restraint whatsoever, except cases of commitment or detainer for criminal or supposed criminal matter?" — and the judges who answered, ten in number, were unanimously of opinion that it did not. Mr. Justice Noel, Mr. Justice Wilmot, Mr. Baron Adams, Mr. Baron Smyth, Mr. Baron Legge, Mr. Justice Dennison, and Lord Chief Baron Parker answered directly in the negative, in the language of the question. The answers of Mr. Justice Bathurst, Mr. Justice Clive, and Lord Chief Justice Willes were, that "the words of the statute, &c., do not extend to such a case." Mr. Justice Bathurst added to his answer: "But in favor of liberty, the judges of the Court of King's Bench have in conformity to that statute extended the same relief to all cases."\*

"In a more enlightened age," says Lord Campbell, (to wit, 56 George III.,) "the bill was again introduced, and received unanimous support in both Houses of Parliament." But this act does not provide for liberation from arrest by the military authority in actual service in time of war; nor does the usage of the judges, as mentioned by Mr. Justice Bathurst, appear to have done so.

The remarks, therefore, of Blackstone and Hallam, cited by Chief Justice Taney, are not applicable; and the English history of the writ of *habeas corpus* fails to sustain his opinion with reference to the case before him.

The American cases, although some of them are founded upon a state of facts much more nearly approaching the pres-

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\* Bacon's Abridgment, Art. *Habeas Corpus*, Editor's note.

ent case, afford us no satisfactory discussion of the principles which must settle it. They may be found collected in Mr. Hurd's valuable treatise on *Habeas Corpus*. Most of them have occurred in time of peace, and did not therefore involve the consideration of principles applicable to a state of war.

There have been several cases in Massachusetts in which the writ has issued in time of war to the commanding officer of a fort within the State, for the discharge of minors who had enlisted without the consent of parents or guardians. But the service of the writ seems to have been regarded as a matter of course, and perhaps no reason is to be inferred why it should not have been, as the military force at the place might not have been in such active service as to require a refusal.\*

The case which most nearly resembles Merryman's is that of Stacy, which occurred in 1813, in which a *habeas corpus* was, by a commissioner of the Supreme Court of New York, directed to "Isaac Chauncey, Commandant of the Navy of the United States on Lake Ontario, and to Morgan Lewis, commanding the troops of the United States at the station of Sackett's Harbor, and to each and every subordinate officer under the said commandants, or either of them," commanding them to bring before the commissioner the body of Samuel Stacy, Jr., together with the cause, &c.† Morgan Lewis, as general of division in the army of the United States, returned that Stacy was not in his custody. Royal Torrey, Provost Marshal, returned that he held Stacy by virtue of a warrant directed to him by J. Chambers, Assistant Adjutant-General, commanding him to receive Stacy into the custody of the provost guard, from Commodore Chauncey, who charged him with an act of high treason against the United States, committed within the territory of the king of Great Britain.

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\* 11 Mass. Rep. 63, 67, 83.

† 9 Johns. Rep. 239.

Affidavits were filed, and the commissioner submitted the papers to the Supreme Court for aid and advice. In that court a motion was made for an attachment, or a rule to show cause why an attachment should not be issued, against General Lewis, Torrey, &c. The opinion of the court was delivered by Chief Justice Kent, who said that the return of General Lewis was bad on the face of it; that it was evidently an evasive return; that he ought to have stated, if he meant to excuse himself for the non-production of the body of the party, that Stacy was not in his *possession* or *power*. And after examining the evidence tending to show that Stacy was in the custody of General Lewis, and stating that the court was bound to consider the order issued from the Adjutant-General's office and the detention under it as the act of General Lewis, the Chief Justice said that there was apparent on the face of the return a contempt of the process, and that one of the affidavits proved not only that Stacy was in custody under the order and by the authority of General Lewis, but that the direction of the writ was intentionally disregarded, and that the only question that could be made was, whether the motion for an attachment should be granted, or whether there should be a rule upon the party offending to show cause, by the first day of next term, why an attachment should not issue. The conclusion was, an order that an attachment should issue, but should not be served if General Lewis should forthwith, on being served with a copy, discharge Stacy, or cause him to be brought before the commissioner in obedience to the *habeas corpus*.

The only remark which it is necessary to make upon this case, in connection with the present discussion, is, that the attention of the court does not seem to have been directed for an instant to the question whether the existence of the war at that time could have any effect upon the right of the military force to make the arrest, or of the commander to hold the

party arrested. And as General Lewis did not claim the right to hold him exempt from the operation of the *habeas corpus*, but made a return to the writ, in the ordinary course, perhaps it may be said that he must be held thereby to have waived any such right, if he possessed it. There can be no doubt that, supposing an exemption from the operation of the *habeas corpus* to exist by reason of the existence of a war, a commanding officer may, in his discretion, waive any right to insist upon the exemption, and yield obedience to the command of the writ, unless controlled by the orders of a superior officer. If a party exempt from the performance of military duty should, notwithstanding, be summoned to the performance of that duty, he may, if he please, waive his right to the exemption.

The high character of the judicial tribunal which passed upon Stacy's case undoubtedly gives a kind of weight even to its omissions; but it is not to be inferred that no distinction exists in respect to the duty of obedience to the writ of *habeas corpus* in time of war and in time of peace, merely because that distinguished tribunal failed to make one, when its attention was not called to the subject. If such an inference were drawn, it would cover every case; and yet it is most clear that cases exist in time of war in which a commanding officer is exempt from arrest on civil process, and from any command to produce a prisoner before a judicial tribunal, even when constitutional provisions are found asserting the liberty of the citizen and the supremacy of the civil authority in much more emphatic terms than those cited by Mr. Chief Justice Taney from the Constitution of the United States. One provision of the Constitution of Massachusetts is, that "Every subject has a right to be secure from all unreasonable searches and seizures of his person, his houses, and all his possessions. All warrants are contrary to this right, if the cause and foundation of them are not previously supported by



oath or affirmation." Another clause declares, that "the military power shall always be held in exact subordination to the civil authority, and be governed by it." Another, that "the power of suspending the laws, or the execution of the laws, ought never to be exercised but by the Legislature, or by authority derived from it," &c. Another, that "no person can in any case be subjected to the law martial, or to any penalties or pains by virtue of that law, except those employed in the army or navy, and except the militia in actual service, but by authority of the Legislature." Now whether, consistently with this last provision, any officer acting under the authority of Massachusetts can declare martial law, or whether martial law can exist in connection with any proceedings of the officers of that Commonwealth, while acting under State authority, so as to affect citizens not in the militia or naval service, without an act of the Legislature for the purpose, is a question the discussion of which may be waived at this time, as there is no similar provision in the Constitution of the United States controlling persons acting under that government. But the question whether, in the time of an actual insurrection, and an attempt to quell that insurrection by a military force actually in the field, the commander of the military force, and the officers and men under him, would be subject to all the ordinary civil liabilities for acts done, to which they would be subject for like acts done in time of peace, is, notwithstanding all these constitutional provisions, another and a very different question. That the military ought always to be subject to the civil power is a general truth applicable to times of peace, but applicable in its full extent only to times of peace. The most ordinary effort of reflection will assure us that in a time of war it has no application to the military power in the field, actively prosecuting the war, even if there is no action of Congress or of the President, under the Constitution of the United States, suspending

the writ of *habeas corpus*. On the contrary, thus applied, it would or might be subversive of the efficiency of military operations. It requires but a moderate degree of common sense to arrive at the conclusion, that a commanding general in Massachusetts, marching to the battle-field, at the head of his column, in performance of his military duty to suppress an insurrection, is for the time exempt from arrest on civil process, whether the action be in contract or tort. Otherwise the army must stop while the sheriff makes the arrest and the general gives bail ; but in the mean time the insurrectionists may attack and rout his forces, who are waiting for the execution of the bail-bond.

It may perhaps be argued, that there is no legal exemption in such cases, but that no arrest could be made because the commanding officer would resist ; and although the resistance would be unlawful, yet no jury could ever be found which would give more than nominal damages. But if it be true that there is no exemption from the arrest, it would be the duty of the commander to submit to it ; the resistance would be the obstruction of an officer in the execution of his duty, subjecting the party to indictment ; and, moreover, the sheriff who attempted to make the arrest might summon the *posse comitatus*, and thereupon insist that the general should give bail, and answer also to a complaint for resisting the arrest ; or else he must fight the *posse* before he could be permitted to fight the insurrectionists.

To talk of a duty to suspend the military operations, submit to an arrest, and give bail, under such circumstances, is sheer nonsense. It is clear that the officer, being in duty bound to the State and the people to perform the military service upon which perhaps the fate of the government was depending for the time being, could not consistently be held to be a wrong-doer for persisting in the performance of that as the superior duty. The civil responsibility to arrest must be

held, by any court giving a reasonable construction to the Constitution and to the law, as suspended for the time being by the paramount military obligation. In other words, the military law must be held to supersede the civil in that exigency, and this in consistency with, and not in antagonism to, the Constitution.

Still more clear must it be to the most indifferent comprehension, that the commander of a column, thus marching to battle against insurgents, is not bound to encamp his men, and, in obedience to the command of a writ of *habeas corpus*, to repair forthwith to the court-house, wherever that may be, or to a judge's chambers, if that be the place selected, taking with him a soldier, whose friends, anxious lest he should be killed in the encounter, have procured the writ upon the ground that he is a minor, and his enlistment into the service illegal and void, and that the order of the commanding officer requiring him to march to the battle is an unlawful duress and detention, he having previously requested a discharge. An examination of the case might require two or three days. The party who should procure such a writ, and attempt thereby to suspend the military operations, would be loaded with execrations; and the general who, under such circumstances, should yield obedience to it, would be deservedly cashiered. But if the civil responsibilities existed as in time of peace, the refusal to make a return would be a contempt of court, for which an attachment should issue; and the general should be arrested, taken before the judge, and fined, perhaps imprisoned. If we find no special exemption from the operation of the civil process in such case in the Constitution or laws of the State, the exemption will rest, not merely upon the fact that the commander would assuredly forthwith use his military power to prevent the attachment, but upon the military responsibility which then rests upon him, and the military law by which he is governed under the Constitution,

altogether inconsistent with, and superseding, the civil responsibility.

But it is not sufficient that we reach the conclusion by intuition, as it were, in cases of such an extreme character. The inquiry presents itself, How far does the principle apply upon which this exemption from civil responsibility rests? The cases which have occurred, and which are likely to occur hereafter, are not cases of an attempt to serve the writ of *habeas corpus* on the actual battle-field, or on the immediate march to it.

If, in discussing the principles involved in the subject, we turn to the early history of the *habeas corpus* in this country, we find very little to aid us in our investigation. The American Colonists generally claimed all the liberties and privileges of natural-born subjects of the realm, and the benefit of the common law for the vindication of those liberties, as a part of their birthright. There is nothing, however, to be found respecting this writ in their earlier history which can render us any service.

In 1689, an application to Judge Dudley in Massachusetts for the writ was "arbitrarily refused," which denial was made the subject of a subsequent suit against the judge.\* A pamphlet was published in Boston during that year, in which the denial of the writ was alleged as one of the grievances of the people. In 1692 an act was passed by the Assembly for the better securing of the liberty of the subject and the prevention of illegal imprisonment, which regulated proceedings on the writ.

About the same time the Assembly of South Carolina adopted the Act of 31 Charles II., it would seem for the especial benefit of the pirates who were then in the habit of settling in that State, and who, making themselves friends of the mammon of unrighteousness which they had acquired, procured

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\* Washburn's Judicial History of Massachusetts, p. 106.

the passage of the act as a protection against the Proprietary government, which was desirous of punishing them for their piracy.\*

After the year 1700 there is evidence of the use of the writ from time to time in several of the Colonies. Instances are collected in Mr. Hurd's treatise, but we have found no case in the Colonial history where there was a question respecting its application to military operations in time of war.

The denial or suspension of the writ is not alleged, in terms, in the Declaration of Independence, as one of the grievances of the Colonies; but "transportation beyond seas, to be tried for offences," is in the enumeration; and the abolition "of the free system of the English laws in a neighboring Province, establishing therein an arbitrary government and enlarging its boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies," which is the next charge in the Declaration, refers, it is understood, to an act making more effectual provision for the government of the Province of Quebec, passed by Parliament in 1774, and which was opposed in the House of Commons because it left the inhabitants under the civil law of France, denying them the right of trial by jury, the writ of *habeas corpus*, &c.†

There seems to be little in the ante-Revolutionary history, therefore, which can serve to give a construction to the provision in the Constitution of the United States which has recently become the subject of so much comment. The debates upon the Quebec Bill may have had some influence in producing it; but an act of Parliament, passed in 1777, may have had a more direct effect. That act recited that rebellion and war had been traitorously levied and carried on in certain of his Majesty's Colonies in America, and that acts of treason

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\* Hurd's *Habeas Corpus*, p. 111; Hewitt's *History of South Carolina*, pp. 115-117.

† Hurd, p. 119.

and piracy had been committed on the high seas ; that many persons had been seized and taken who were expressly charged, or strongly suspected, of such treasons and felonies ; and that it might be inconvenient to proceed forthwith to the trial of them, and at the same time of evil example to suffer them to go at large ; — and thereupon it was enacted, that all such persons, committed by any magistrate having competent authority in that behalf, should be detained in safe custody, without bail or mainprise, until the first day of January, 1778 ; and that no judge or justice should bail or try any such person until that date, without an order from the Privy Council. The fourth section confined it to acts committed without the realm.\*

The original motion which gave rise to the clause in the Constitution was made by Mr. Charles Pinkney of South Carolina, but his proposition was amended on motion of Mr. Gouverneur Morris.†

The constitutional provision, instead of settling anything upon the subject, except a restriction of the power of suspension to two occasions, has introduced a new element of uncertainty, by raising a question whether suspension of the writ (which the clause, by implication, admits may exist) may be made or authorized by the President, or whether the power of suspension is confined to Congress alone. This question might involve another, to wit, whether the suspension is a denial of the writ itself, so that it cannot be issued during the term of the suspension ; or whether it is merely an authority, in some way existing, permitting persons accused of certain classes of offences to be held against the operation of the writ when issued, so that a return that the party is committed or held on an accusation of such offence, if true in point of fact, will be a bar to further proceedings upon the writ. If it were

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\* Statutes at Large, 17 Geo. III. chap. 9.

† 3 Madison Papers, 1365, 1441.

the first, as the term "suspension" might seem to indicate, then it would be clear that the suspension which is thus restricted could be made only by Congress; for from the nature of the case no power could exist forbidding the writ to issue, except in Congress. It would require an act of legislation. If, on the other hand, the suspension which is thus restricted is only an authority to hold a person arrested, against the operation of the writ, so that the party to whom it is directed is not bound to produce the prisoner according to its command, and may by a return show that he is not bound to produce him, or may refuse to produce him without a return, then the suspension may not only not require a legislative act in certain cases, but it may result from circumstances, without any act, legislative or otherwise, declaring a suspension. There seems to be no reasonable doubt that the suspension referred to in the Constitution is of this character, and not a prohibition of the issue of the writ. It is believed that the acts of Parliament which are known as suspensions of the *habeas corpus* do not purport to forbid the issue of the writ, or authorize a denial of it. Mr. Hurd\* speaks of the statute 17 George III. chap. 9, as an act by which the writ of *habeas corpus* was denied, but it did not restrain the issue of it; and the act of 34 George III. chap. 54, referred to in Bacon,† only provided that persons detained for high treason, &c. might be held in custody without bail or mainprise until a certain day, and that no judge should bail or try a person so committed without an order from the Privy Council. It also suspended an act for preventing wrong imprisonment.

Now it is to be noted, that *the constitutional provision is not a grant of power*, but a restriction upon a power assumed to exist, and the exercise of which is to be limited; without any assertion or assumption when it exists, by whom it

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\* *Habeas Corpus*, p. 132.

† *Abridgment, Tit. Habeas Corpus*, B. 4, note.

may be exercised, or under what circumstances it might be exercised but for the restriction and limitation. By whatever body or person, or under whatever circumstances, the *habeas corpus* might have been suspended, but for this constitutional limitation, by that body or person, and under those circumstances, it may still be suspended in time of rebellion or invasion; but by no body or person, nor under any circumstances, can it be suspended by means of any authority emanating from the United States, at any other time than when there is either rebellion or invasion, and the public safety requires it.

This distinction between a grant of power and a restriction upon a power has not been sufficiently adverted to in some of the discussions upon the subject. Mr. Chief Justice Taney himself treats the constitutional provision as a grant of power. He says, "The clause in the Constitution which *authorizes* the *suspension* of the privilege of the writ of *habeas corpus* is in the ninth section of the first article"; and as the provisions of that article relate mainly to Congress, he argues that the authority to suspend is conferred on Congress alone. Then he says: "It is the second article of the Constitution which provides for the organization of the Executive Department, and enumerates the powers conferred on it, and prescribes its duties. And if the high power over the liberty of the citizens, now claimed, was intended to be conferred on the President, it would undoubtedly be found in plain words in this article." Whereas, in truth, the Constitution did not intend to confer, in terms, any power to grant the writ of *habeas corpus*, nor any power to suspend it, but left the power to grant and the power to suspend to be settled by general principles, with the single exception of a limitation upon the power of suspension to the two exigencies which it specified.

There is therefore no question whether the Constitution, in the clause mentioned, confers the power of suspension upon Congress alone, or whether it gives it to the President also; for



it gives it to neither. The power exists as an incident to other powers expressly conferred. That it is thus given as an incident is clear from the restriction itself, which would otherwise be wholly nugatory ; for a restraint upon a power is in itself in no sense a grant of the power upon which the restraint is imposed. Congress possesses the power to suspend the *habeas corpus*, as an incident to its power to suppress an insurrection, and as an incident to its power to make war, because a suspension may be made by a legislative act ; and but for the restriction, Congress might suspend it in case of war when there was no invasion of the United States. Whether the President possesses the power to order or authorize it, as an incident to his office as commander-in-chief of the army and navy, or whether he has it as an incident to his duty to see the laws faithfully executed, we do not propose to inquire. The opinion of the learned Attorney-General upon the latter point is already before the public, and we do not deem the settlement of those questions necessary to our present purpose.

Taking the constitutional provision as a clause of restraint, the inquiry which is presented to us is, under what circumstances, upon the more general principles of law, may there lawfully be a refusal to produce, in obedience to the writ of *habeas corpus*, a person detained or imprisoned in time of rebellion or invasion. Starting, as Mr. Chief Justice Taney did, with the grave error in his premises of supposing a restraint upon a power to be a grant of it, it is not surprising that he did not reach any right conclusion upon this subject. It would have been wonderful had he done so.

Upon the inquiry thus indicated, our first proposition is, that in time of actual war, whether foreign or domestic, there may be justifiable refusals to obey the command of the writ, without any act of Congress, or any order or authorization of the President, or any State legislation for that purpose ; and the principle upon which such cases are based is, that

the existence of martial law, so far as the operation of that law extends, is, *ipso facto*, a suspension of the writ.

The existence of martial law and the suspension of the *habeas corpus* have been said to be one and the same thing; but in fact the former includes the latter, and much more. Wherever that law exists, searches and seizures may be made without warrant, and persons may be arrested without process. The search, seizure, and arrest give no cause of action. The detention, unless there is an abuse, furnishes no claim for damages against the officer who enforces it.

The case *Luther vs. Borden* and others\* covers this whole ground. That case, it is familiarly known, arose out of an attempt to change the government of Rhode Island, and was an action of trespass for assault and false imprisonment, brought for breaking and entering the plaintiff's house with an armed force, and taking and holding him as a prisoner. The defendants offered several pleas in justification, setting forth in substance the existence of an insurrection to overthrow the government of the State by military force,—that at the time of the alleged trespasses the State was under martial law, declared by the General Assembly in defence of the government,—that the plaintiff was aiding and abetting the insurrection, and the defendants, being enrolled in a certain company of infantry, were ordered to arrest the plaintiff, and if necessary to break and enter his dwelling-house for that purpose,—that it was necessary, and thereupon they did break and enter, and searched his house, doing as little injury as possible, &c. The action was designed not merely for the private remedy, but to test the questions which arose between the two political parties. Mr. Chief Justice Taney then said, speaking of the state of affairs in Rhode Island (where, by the way, armed collision was only threatened, without an actual conflict of the opposing forces):—

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\* 7 Howard's Supreme Court Reports, 1.

"In relation to the act of the Legislature declaring martial law, it is not necessary in the case before us to inquire to what extent, nor under what circumstances, that power may be exercised by a State. Unquestionably a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it. But the law of Rhode Island evidently contemplated no such government. It was intended merely for the crisis, and to meet the peril in which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the State authorities. And unquestionably a State may use its military power to put down an armed insurrection too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government. The State itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition so formidable and so ramified throughout the State as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority.

"It was a state of war; and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition. And in that state of things the officers engaged in its military service might lawfully arrest any one who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection, and might order a house to be entered and searched, where there were reasonable grounds for supposing he might be there concealed. Without the power to do this, martial law and the military array of the government would be mere parade, and rather encourage attack than repel it."

He added : —

"No more force, however, can be used than is necessary to accomplish the object. And if the power is exercised for the purpose of oppression, or any injury wilfully done to person or property, the party by whom or by whose order it is committed would undoubtedly be answerable."

This last is but the application of the ordinary principles of law to cases of the abuse of powers conferred by law.

Now it is quite clear that if a state of war and the existence of martial law will authorize the officers engaged in the military service to break open and search a house where there is reason to suppose that a person, whom they have reasonable grounds to believe was engaged in an insurrection, is concealed, and to arrest him if found, without any warrant from a magistrate for that purpose, *a fortiori* they may hold him after his arrest against any civil process issued for his liberation. The law of the arrest is the law of the detention, and the *habeas corpus* is suspended so far that no return to the writ can be required of the officer who holds the prisoner under the law which authorized the arrest. To say that the military authorities had a right without warrant to break and enter what in time of peace is denominated a man's castle, and that they may without warrant lawfully arrest any one, on reasonable information that he was engaged in the insurrection, and then to hold that the authority thus making the arrest was bound thereupon to obey the writ of *habeas corpus* and bring the party before a magistrate, on the ground that the arrest and imprisonment were unlawful, and that he was entitled to his discharge forthwith, because the arrest and detention *were thus without a civil warrant*, would be an inconsistency and absurdity of which Mr. Chief Justice Taney could hardly be guilty when he put *this* and *that* together. And yet he relies upon the constitutional provision that no person can be arrested without warrant, to show that Merryman ought to have been brought before him, and that he was entitled to be discharged.

If, therefore, Merryman's arrest or detention was under martial law, then, on the principle enunciated by the Chief Justice, as the organ of the court, in *Luther vs. Borden*, the arrest or imprisonment cannot be declared to be unlawful.

Before proceeding to inquire whether martial law was actually in existence at Fort McHenry when the Chief Justice issued the writ requiring General Cadwalader to produce the body of Merryman before him, and to make return of the cause of his detention, it may be well to dispose of two or three incidental questions.

Supposing martial law to have been in existence at the time, and that General Cadwalader held Merryman lawfully under it, was not the General bound to make his appearance before the Chief Justice, with his prisoner, and to make a return according to the requirement of the writ of *habeas corpus*, so that it might appear to the civil authority that the prisoner had been arrested, and was held, under martial law? So far from this being true, we are of opinion that it may safely be asserted that, if the prisoner was actually held under martial law when the writ was issued, the military commander who was then authorized to enforce martial law, and was himself subject to it, was not bound to obey the writ, even supposing the arrest and the imprisonment to have been so far unlawful that an action would lie to recover damages for an abuse of the power under which the arrest and detention were had.

The right to a remedy in damages would not interfere with the due maintenance and execution of martial law, if there was no attempt to enforce it by an arrest of the military officer while in the execution of his military office; which, if attempted, might, as we have seen, raise another question. But it seems to be perfectly clear that the party holding a prisoner under martial law cannot be required to bring him up for an examination under the municipal law. If he might be, then, in the language of Mr. Chief Justice Taney in *Luther vs. Borden*, before cited, "martial law and the military array of the government would be mere parade, and rather encourage attack than repel it." Let us test this. It will not be

denied, we presume, that it is one of the first duties of a military commander in time of war, if not the very first, to hold the post and perform the military duty assigned to him, and to keep watch and ward, not only that there may be no detriment to the service by open assault of the public enemy, or by secret plots of concealed traitors, but to make sure that the troops under him, with the material of war intrusted to his care and management, are at all times in readiness for such service as may be required of him by the orders of his superior officers, or by the exigencies of the public service if he have a separate, independent command. If he is a subordinate officer, he cannot, according to the law which ordinarily governs him, leave the post he is ordered to occupy and hold, without a military order for that purpose, upon the penalty denounced by that law; and that penalty may be death itself. Now the question comes, May the command of the civil process justify him in abandoning the duty with which he is thus intrusted, or in committing it to other parties for the time being, in order that he may attend court? If the military law which governs him is martial law, it is very clear that he cannot justify or excuse his absence from his post on such a command; for if martial law, when it is in existence, supersedes the civil law, as we have seen from the opinion of Mr. Chief Justice Taney that it does, and as it evidently must do, then "it follows, as the night the day," that no command of any civil officer, requiring a commander to leave his post and violate his military obligation, could impose any duty upon him. As we have said, an officer in an independent command might exercise a discretion on the subject; but that is not material to the argument.

It appears in the opinion of the Chief Justice that the application for the *habeas corpus* was made to him while in Washington, under the impression that he would order the prisoner to be brought before him there; but as Merryman was con-

fined at Fort McHenry, within his circuit, he resolved to hear the case at Baltimore, "*as obedience to the writ, under such circumstances, would not withdraw General Cadwalader, who had him in charge, from the limits of his military command.*" The Chief Justice very coolly puts this as a matter of discretion, and as if he might be entitled to some credit for not requiring the General to absent himself from the limits of his military command in time of war, thereby superseding him for the time being, depriving the military arm of the country of the services of an officer of such high grade, who had command of a district which required sleepless and untiring vigilance for the preservation of order; without once considering the consequences which might have resulted had he thus required the officer to leave his post, to repair with his prisoner to a place outside of his military district, and there to remain with the prisoner until the lawyers could argue the case, and a decision could be made. If a thought had been given to that matter, it might have led to the inquiry, how far, upon general principles, without any legislative suspension or any formal declaration of martial law, the writ of *habeas corpus* can penetrate a military camp, in time of war, and arrest the whole military operations of the government at that place.

If Mr. Chief Justice Taney could thus have required the attendance of General Cadwalader at Washington, Mr. Justice Catron, if the insurgents had not driven him from Tennessee, might require the general in command at St. Louis to repair to Nashville, bring with him the body of any person taken in Missouri in arms against the government, and there show cause why he holds him as a prisoner. If there were any other Confederate General than Pillow threatening to come up the Mississippi, the idea of such a legal power at the time we are writing would be perfectly preposterous.

If such might be the consequences of the propositions laid down by Mr. Chief Justice Taney, the judicial power may be

made quite as effectual to overthrow the government in time of war as the suspension of the *habeas corpus*, by order of the President, in time of peace, could be to overthrow the liberties of the people, — somewhat more so, indeed, as the effect of the latter could be more readily and securely avoided. Judge Catron may probably make his peace with the insurgents, if he will take his stand at Nashville, issue the writ, and cause it to be obeyed.

But it may be urged, that the return to the writ in Merryman's case, so far as there was a return, was that the President had suspended the *habeas corpus*, or had authorized General Cadwalader to suspend it; that, if neither of them had power to do so, there was nothing to show the existence of martial law, or any impediment to the full operation of the writ; and that it is necessary, therefore, to establish the power of the President in the case.

To this it may be answered, that the Chief Justice had knowledge of the existence of war. That was a fact which did not require proof before him. He was bound to take judicial notice of the President's proclamation. If, without further proof than was then before him, he could not judicially know, also, that troops from Massachusetts and from Pennsylvania, hastening to the relief of the capital, had been assailed in the very city where he was proposing to bring up the prisoner, he was not bound to ignore that fact, but might well, upon such knowledge as he must undoubtedly have had in common with the rest of the community, have made an inquiry whether there had not been an actual armed collision, by which several persons had been killed, and troops from Pennsylvania turned back, showing a state of insurrectionary violence; for, although this collision was brought on by the irregular force of a mob, the evidence before him, and on which he assumes to found his opinion, might have shown him that this violence of the mob was in fact insurrectionary, as is



abundantly shown by the destruction of the bridges and rail-roads for the purpose of preventing more troops from reaching the capital. It was for the destruction of the bridges with this intent, among other things, that the prisoner, Merryman, was arrested. If the judicial mind of the Chief Justice required more formal evidence of these matters, it could readily have been furnished. But this is not material, for the Chief Justice knew, from the evidence before him, that Merryman was held by a military power called out for the purpose of suppressing the insurrection against the government, and that he was held in a military fortress belonging to the government, and then occupied by the military forces of the government, for the purpose of resisting and quelling this insurrection. He sent his writ to the fort, directed to the general who, as he understood, commanded the military district,—a district which had been created by reason of the insurrection, and a general who had been called into service for the very purpose above mentioned ; and if martial law existed at the time and place, from general principles of law applicable to such a condition of things, the Chief Justice was bound to take judicial notice of that fact without further evidence.

This brings us to the question, Was martial law in existence at Fort McHenry at the time when the writ was issued and the return made? In order to determine this question, we inquire, What is martial law? It is said that there is a distinction between military law and martial law. Undoubtedly there is to this extent, that military law is for the government of the military force, and does not necessarily imply the existence of martial law. Military law may and does exist in time of peace, for the government of the army ; but martial law includes military law, and it exists only in time of war. The Duke of Wellington is quoted as having said, that “martial law is the will of the commander-in-chief,” and Blackstone says it “is built upon no settled principles, but

is entirely arbitrary in its decisions." With such a scope and extent it cannot exist in this country consistently with the Constitution, for it would be utterly subversive of the Constitution for the time being. Neither the President nor Congress can constitutionally proclaim or authorize such a power, nor can it exist by the general principles of law. Burrill, in his Dictionary, defines it as "An arbitrary kind of law or rule, sometimes established in a place or district occupied or controlled by an armed force, by which the civil authority and the ordinary administration of the law are either wholly suspended or subjected to military power." This is founded upon the idea of Blackstone, and is clearly imperfect as a definition, unless the military power which exercises this law or rule is not responsible to the civil authority in any mode for the manner of its exercise; which in this country is clearly contrary to the fact. It has been said, that it is "founded upon a paramount necessity." Of course, then, it extends as far as the necessity extends, and no further. It may be that in certain cases the military authority must judge of the military exigency, so that its determination whether the military necessity exists will be conclusive; but still the power will be restricted to the scope of the necessity which it has been determined exists, so that if an arbitrary force is used, having no connection with the exigency, or not within the possible scope of the necessity, the party guilty of it will be civilly responsible for his acts.

If the military commander should depart from the possible scope of the military necessity, and commit a private wrong, disconnected from it, as for instance a personal assault to gratify private revenge, the existence of martial law would not excuse him from punishment afterward by a judicial tribunal. So if, under pretence of the exercise of martial law, he should be guilty of unnecessary force or oppression, showing an abuse of the power demanded by the military neces-

sity. This is substantially the principle laid down in *Luther vs. Borden*, where the court say: "No more force can be used than is necessary to accomplish the object, and if the power is exercised for the purposes of oppression, or any injury wilfully done to person or property, the party by whom or by whose order it is committed would undoubtedly be answerable."

Martial law, then, is that military rule and authority which exists in time of war, and is conferred by the laws of war, in relation to persons and things under and within the scope of active military operations in carrying on the war, and which extinguishes or suspends civil rights, and the remedies founded upon them, for the time being, so far as it may appear to be necessary in order to the full accomplishment of the purposes of the war; the party who exercises it being liable in an action for any abuse of the authority thus conferred. It is the application of military government—the government of force—to persons and property within the scope of it, according to the laws and usages of war, to the exclusion of the municipal government, in all respects where the latter would impair the efficiency of military rule and military action.

Founded upon the necessities of war, and limited by those necessities, its existence does not necessarily suspend all civil proceedings. Contracts may still be made, and be valid, so long as they do not interfere with or affect the military operations. A mere trespass by A. upon the land of B., unconnected with military service, is none the less a trespass, and does not require a military trial or determination. The courts are not necessarily closed, for all actions relating merely to the private affairs of individuals may still be entertained without detriment to the public service; but it closes the consideration there of any action, suit, or proceeding in which the civil process would impair the efficiency of the

military force. Chief Justice Taney's court might be open, but he could not subject General Cadwalader to any civil duty which conflicted with his military duty.

We shall ascertain its extent in some measure if we inquire, What are the rights and usages of war under which, according to the opinion of the court in *Luther vs. Borden*, the government, in order to maintain itself, and to overcome the unlawful opposition, may lawfully arrest persons without warrant, and for this purpose may forcibly enter a house on suspicion that a person engaged in the insurrection is concealed there? What are the rights and usages of war according to which persons may be seized and held because the public safety requires it, — or because the conduct of the enemy requires that hostages be taken, — or according to which persons may be impressed, for the time being, into the military service, and required to perform military duty, — or property may be destroyed, or seized and used for the military service, without the assent of the owner? If such rights and usages might exist without the existence of martial law, they would be sufficient for our present purpose; for when such rights exist, we have already shown that the *habeas corpus* is necessarily suspended. But the existence of such rights seems to indicate with precision the existence of martial law.

A question has arisen whether a commanding general can, by proclamation of martial law, give force to this military rule beyond the limits of his camp, or of the military position occupied by him. Mr. Justice Woodbury, in *Luther vs. Borden*, expressed the opinion that he might do so over a space near the field of his operations.\* And it is well known that other very distinguished gentlemen have entertained like opinions, or perhaps those giving the proclamation a greater territorial operation.

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\* 7 Howard's Rep. 83.

Now it may, we think, be laid down as a safe principle, that in time of war any fort or camp occupied by a military force, for the purposes of the war, is *ipso facto*, without any special proclamation, under the government of martial law, such as we have described it. And the same, in our opinion as at present advised, is equally true of any column of soldiers mustered into active service for the like purpose, whether on the march or at rest. It is not necessary to speak of soldiers mustered into the service of the government, but stationed at a distance for the purpose of being called into active service when occasion may require. They may, or they may not, be under the government of military law only, as in time of peace. But this cannot be said of troops actively engaged in the service of the government. Whether those troops are in the face of the enemy, in battle array, or whether they are merely garrisoning a fort to aid thereby in suppressing a rebellion, or whether they are opening and holding the avenues by which the passage of other troops to the theatre of active war is to be facilitated, the law which governs the place where they are is martial, and not municipal. This is necessary to enable the government to use the military force efficiently, and also for the protection of the officers and soldiers.

There are very respectable authorities which tend to support this position, although we admit that the subject has not been very fully discussed.

We refer, in the first place, to a speech of Mr. John Quincy Adams in the House of Representatives, on the 14th and 15th of April, 1842, which was reported in the *National Intelligencer*, April 16th and 19th, and afterward printed in pamphlet form at the *Emancipator* office, in Boston. Upon a motion to strike out so much of an appropriation bill as related to the salary of a minister to Mexico, and a motion to amend that amendment by reducing the appropriation for the

missions to Austria and Prussia one half, the debate, as usual, ran off into topics having no connection whatever with the subject nominally under consideration, and, among other matters, into the consideration of the emancipation of slaves. Mr. Adams said : —

“ When your country is actually in war, whether it be a war of invasion or a war of insurrection, Congress has power to carry on the war, and must carry it on according to the laws of war ; and by the laws of war an invaded country has all its laws and municipal institutions swept by the board, and martial law takes the place of them. This power in Congress has, perhaps, never been called into exercise under the present Constitution of the United States. But when the laws of war are in force, what, I ask, is one of those laws ? It is this : that when a country is invaded, and two hostile armies are set in martial array, the commanders of both armies have power to emancipate all the slaves in the invaded territory. Nor is this a mere theoretic statement. The history of South America shows that the doctrine has been carried into practical execution within the last thirty years. . . . . And here I recur again to the example of General Jackson. What are you now about in Congress ? You are about passing a grant to refund to General Jackson the amount of a certain fine imposed upon him by a judge under the laws of the State of Louisiana. You are going to refund him the money, with interest ; and this you are going to do because the imposition of the fine was unjust. And why was it unjust ? Because General Jackson was acting under the laws of war, and because *the moment you place a military commander in a district which is the theatre of war, the laws of war apply to that district.* . . . . I might furnish a thousand proofs to show that the pretensions of gentlemen to the sanctity of their municipal institutions under a state of actual invasion and of actual war, *whether servile, civil, or foreign*, is wholly unfounded, and that the laws of war do in all such cases take the precedence. *I lay this down as the law of nations.* I say that the military authority takes, for the time, the place of all municipal institutions, and slavery among the rest. I am open to conviction, but until that conviction comes, I put it forth, not as a dictate of feeling, but as a settled maxim

of the laws of nations, that in such a case the military supersedes the civil power."

A writer of several articles published in the Louisville Journal, and afterward collected in a pamphlet, — who admitted that he had, up to the time of writing, "supposed that, in the estimation of all intelligent men in this country, martial law stood upon the precise same footing, and none other, as Lynch law, Regulators' law, or mob law," and who said that "in a legal or moral sense they all have the precise same basis," and that "they are equally the same arbitrary usurpation of power, without a particle of law or right to sustain either," — denounced Mr. Adams's speech, and the speeches also of Mr. Buchanan and Mr. Berrien upon the question of remitting General Jackson's fine, in very strong terms; asserting that the doctrine "promulged" was, that martial law is "a law paramount to the Constitution itself, — a law which sweeps the Constitution and all other civil law by the board, and leaves the property, the liberty, and the life of every citizen at the will of a military despot."

In a subsequent debate in the House, January 5, 1843, Mr. Adams referred to this pamphlet, and said that in it he was charged with having given an opinion in relation to the power of a commanding general to declare martial law that was utterly at variance with freedom and the laws of nations, and he wished to have an opportunity of answering that charge. He wished to have an opportunity to explain and defend the opinions he had given. But the debate was continued, so far as we are aware, without the desired defence and explanation.

Mr. Berrien is reported to have said, that "General Jackson was perfectly excusable, under all the circumstances of the case, in declaring martial law, and that he was equally excusable in disobeying the writ of *habeas corpus*."

Mr. Justice Woodbury, in the dissenting opinion delivered by him in *Luther vs. Borden*, while taking a different view of

martial law from that adopted by a majority of the court, and denying the authority of the Legislature of Rhode Island to declare martial law under the existing circumstances, said : —

“The necessities of foreign war, it is conceded, sometimes impart great powers as to both things and persons. But they are modified by those necessities, and subjected to numerous regulations of national law and justice and humanity. These, when they exist in modern times, while allowing the persons who conduct war some necessary authority of an extraordinary character, must limit, control, and make its exercise, under certain circumstances, and in a certain manner, justifiable or void, with almost as much certainty and clearness as any provisions concerning municipal authority or duty. So may it be in some extreme stages of civil war. Among these, my impression is that a state of war, whether foreign or domestic, may exist, in the great perils of which it is competent, under its rights and on principles of national law, for a commanding officer of troops under the controlling government to extend certain rights of war, not only over his camp, but its environs and the near field of his military operations. (6 American Archives, 186.) But no further, nor wider. (*Johnson vs. Davis et al.*, 3 Martin, 530, 551.) On this rested the justification of one of the great commanders of this country and of the age, in a transaction so well known at New Orleans.

“But in civil strife they are not to extend beyond the place where insurrection exists (3 Martin, 551); nor to portions of the State remote from the scene of military operations, nor after the resistance is over, nor to persons not connected with it (*Grant vs. Gould et al.*, 2 Hen. Bl. 69); nor even within the scene can they extend to the person or property of citizens against whom no probable cause exists which may justify it (*Sutton vs. Johnson*, 1 D. and E. 549); nor to the property of any person without necessity or civil precept. If matters in this case had reached such a crisis, and had so been recognized by the general government, or if such a state of things could and did exist as to warrant such a measure independent of that government, and it was properly pleaded, the defendants might perhaps be justified within those limits, and under such orders, in making search for an



offender or an opposing combatant, and, under some circumstances, in breaking into houses for his arrest." \*

In the closing part of his opinion he says : —

"And though it is very doubtful whether in any other view, as by the general rights of war, these respondents can justify their conduct on the facts now before us, yet they should be allowed an opportunity for it."

It is quite clear, therefore, that the learned judge recognized "*certain general rights of war*," under which parties would be justified in making searches and seizures without warrant, and in breaking into houses for that purpose. The limitations which he suggests would to a great extent defeat the right, unless the judgment of the military authority respecting the existence of the exigency in which the right may be exerted is to be held conclusive on that point. To submit that question, in all cases, to the subsequent determination of a jury, would not be consistent with the principle upon which the right is founded, — which must be the existence of a rule superseding the municipal law in the particular case, which rule is martial law.

The personal irresponsibility of officers and soldiers for acts which would in time of peace be trespasses upon other persons will serve to show the existence of martial law ; for the irresponsibility can be sustained only on the laws of war. The existence of martial law formed, as we have seen, the justification of the defendants in *Luther vs. Borden*, for breaking the house and seizing and holding the plaintiff without warrant. It was the only justification.

To state the question, then, in another form, How far does this personal irresponsibility or justification extend in such cases ? Upon this question, undoubtedly, opinions have not been uniform.

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\* 7 Howard's Rep. 83.

We believe it to be a sound principle, that, in time of war, every soldier mustered for the active purposes of the war, whether in fort, camp, or column, is bound to yield implicit obedience to any command of his superior which may be within the scope of the military service due from him, without any inquiry whether such command would be justifiable according to the rules of the municipal law; and he is excused from civil responsibility for the performance of the act required, because of this obligation. Our principle, of course, does not embrace acts required and done which are entirely aside from his military duties.

It must be admitted that the writer in the *Louisville Journal*, to whose articles we have referred, does not sustain our proposition. He says: —

“ We are told of two cases of the violation of law and private right by Washington, at the siege of York, as the two greatest, if not the only, instances of the usurpation of power by him during the whole of the Revolutionary war. They will serve as examples to elucidate the subject, verging as they do to the very utmost limit of what an officer may do, and stand morally excused, without being excused by the law. One was the demolition of a house that stood in the way of his approaches to the works of the enemy, and the other authorizing the seizure of some cattle, indispensable to the sustenance of his army. Both were, even strictly speaking, necessary violations of law and private right, but no otherwise so, except in a moral sense, than if the same things had been done by a private individual. Legally speaking, the acts derived no validity from the facts of their having been done by a military commander under circumstances of the most urgent state necessity. He, no doubt, would voluntarily have made good the damage out of his own pocket, if redress could have been had in no other way; but he could have been compelled to do so in a court of law. The circumstances attending the acts would have aided his defence no otherwise than to prevent the jury from giving what is termed smart-money. If he had sold the cattle or bartered them for other provisions, he would not have transferred the title; but the owner could still have

recovered them from whomsoever he might have found in possession. If the owner had resisted, and killed the officer making the seizure, it would have been justifiable homicide; if the officer had killed him, it would have been murder."

Such doctrine needs no other refutation than its evident absurdity. If General Washington was a trespasser in ordering the acts thus specified, every private soldier who assisted in the performance of the service was equally so; for the command to commit a trespass affords no justification for the act. Such is the general principle, and the principle was applied in *Mitchell vs. Harmony*, 13 Howard's Rep. 115.

The opinion of the Supreme Court of New York in the case of *McLeod*, even supposing it to be sound, does not conflict with our position. *McLeod*, who was a subject of the Queen of Great Britain, residing in Canada, was arrested in New York, charged with the murder of *Durfee*, who was killed at the time of the destruction of the steamer *Caroline* on the American side of the Niagara River, in December, 1837, because, as was alleged, she was employed in aiding the rebels in Canada, by carrying military stores to Navy Island. He was brought up on *habeas corpus*, in 1841, and his discharge was moved, among other reasons, because the attack on the *Caroline* was an act of public force, committed by command of the British government, all the defendant did being by the command of his superior officer, and in obedience to his own government; and because for acts done under such authority he was not responsible, personally and individually, in any court of law whatever. The court refused to discharge or bail him, holding that he was liable to be proceeded against individually in the criminal courts of New York for arson and murder.\* The soundness of the opinion was impugned by Mr. Webster, then Secretary of State,† and by

\* 25 Wendell's Rep. 483; 1 Hill's N. Y. Rep. 377.

† 25 Wendell's Rep. 512, note.

other distinguished jurists; and it was controverted in a very able review by Judge Talmadge. But supposing it to be beyond question, the grounds upon which the court in New York proceeded were, that a nation can exercise the right of war only within its own territory, or that of its enemy, or in one which is vacant; that an order of a nation at war, for the destruction of life or property of its enemy within the territory of a neutral power is void, and affords no protection to persons acting under it; and that a sovereign has no right to compel his subject to enter a neighboring country and commit any unlawful act, whether in peace or war.\*

The case *Elphinstone vs. Bedreechund*† is not precisely to the point, but it may serve to illustrate the subject. The marginal abstract of it is as follows.

“The members of the provisional government of a recently conquered country seized the property of a native of the conquered country who had been refused the benefit of the articles of capitulation of a fortress, of which he was governor, but who had been permitted to reside under military surveillance in his own house in the city in which the seizure was made, and which was at a distance from the scene of actual hostilities. *Held*, that the seizure must be regarded in the light of a hostile seizure, and that a municipal court had no jurisdiction on the subject.

“*Semle*,—The circumstances, that at the time of the seizure the city where it was made had been for some months previously in the undisturbed possession of the provisional government, and that courts of justice under the authority of that government were sitting in it for the administration of justice, do not alter the character of the transaction.”

In the course of the argument the Attorney-General, Sir James Scarlett, said:—

“It is unnecessary to refer to any decisions upon the law of Eng-

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\* 1 Hill's Rep. 378.

† 1 Knapp's Reports of Cases before the Privy Council, 316.

land, or any modern jurists, to illustrate the position, that in a state resulting from a state of war, if property is seized under an erroneous supposition that it belongs to the enemy, it may be liberated by the proper authority, but no action can be maintained against the party who has taken it in a court of law. If our English naval commander seizes property as enemies' property, that turns out clearly to be British property, he forfeits his prize in the Court of Admiralty, and that court awards the return of it to the party from whom it was taken; but the case of *Le Caux vs. Eden* (Douglas, 573) decides the question that no British subject can maintain an action against the captor."

And again:—

"If property is taken by an officer under the supposition that it is the property of a hostile state, or of individuals, which ought to be confiscated, no municipal court can judge of the propriety or impropriety of the seizure; it can be judged of only by an authority delegated by his Majesty, and by his Majesty ultimately, assisted by your Lordships as his Council. There are no direct decisions upon such questions, because, as was stated by Lord Mansfield in *Lindo vs. Rodney* (Douglas, 592), they are cases of rare occurrence."\*

The opinion given by Lord Tenterden, without reasons assigned, is in these words:—

"We think the proper character of the transaction was that of hostile seizure made, if not *flagrante*, yet *nondum cessante bello*, regard being had both to the time, the place, and the person, and consequently that the municipal court had no jurisdiction to adjudge upon the subject; but that, if anything was done amiss, recourse could only be had to the government for redress. We shall therefore recommend it to his Majesty to reverse the judgment."

The case *Mitchell vs. Harmony* † distinctly recognizes the principle which we state, but with some limitations, which may hereafter be found too stringent for its fair operation. In that case Mr. Chief Justice Taney said:—

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\* 1 Knapp's Reports, 357.

† 13 Howard's Rep. 115.

"There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service, or take it for public use. Unquestionably, in such cases the government is bound to make full compensation to the owner, but the officer is not a trespasser.

"It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified."

"In deciding upon this necessity, however, the state of the facts, as they appeared to the officer at the time he acted, must govern the decision; for he must necessarily act upon the information of others, as well as his own observation. And if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it; and the discovery afterwards that it was false or erroneous will not make him a trespasser."

"The case mentioned by Lord Mansfield, in delivering his opinion in *Mostyn vs. Fabrigas*, 1 Cowp. 180, illustrates the principle of which we are speaking. Captain Gambier, of the British navy, by the order of Admiral Boscawen, pulled down the houses of some settlers on the coast of Nova Scotia who were supplying the sailors with spirituous liquors, the health of the sailors being injured by frequenting them. The motive was evidently a laudable one, and the act done for the public service. Yet it was an invasion of the rights of private property, and without the authority of law, and the officer who executed the order was held liable to an action, and the settlers recovered damages against him to the value of the property destroyed."

"If the power exercised by Colonel Doniphan had been within the limits of a discretion confided to him by law, his order would have justified the defendant, even if the commander had abused his power, or acted from improper motives. But we have already said that the law did not confide to him a discretionary power over private property. Urgent necessity would alone give him the right, and the verdict finds

that this necessity did not exist. Consequently the order given was an order to do an illegal act, to commit a trespass upon the property of another, and can afford no justification to the person by whom it was executed. The case of Captain Gambier, to which we have just referred, is directly in point upon this question. And upon principle, independent of the weight of judicial decision, it can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order of his superior. The order may palliate, but it cannot justify." \*

Let us illustrate the subject a little further. The march of the New York Seventh Regiment, and of the Eighth Massachusetts under command of General Butler, to Washington, by the way of Annapolis, is too fresh in the recollection of most of our readers to require a minute detail of facts. At Annapolis they found that the Secessionists of Maryland had disabled the locomotive, and, as had been done on the direct route, had torn up the railroad track and destroyed the bridges. Under the direction of General Butler and other officers the locomotive was repaired, the cars put in running order, the track relaid, the bridges rebuilt, the transit of the troops secured, and Washington thereby rendered safe for the time being. It was the military duty of General Butler to march his force to Washington with all possible diligence; but if his command was not under the government of martial law, then it was, so far as the rights of other persons were concerned, subject to the municipal law.

If Mr. Chief Justice Taney's positions in Merryman's case are correct, then General Butler, and all of the Massachusetts Eighth and New York Seventh, were mere trespassers, severally liable to actions of trespass in favor of the railroad company and the inhabitants upon whose lands they came; and in such actions the sheriff would probably have been ordered to arrest the bodies of the defendants if it could have been

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\* 13 Howard's Rep. 134 - 137.

done. Bail could hardly have been procured, and instead of arriving in Washington for the defence of the capital, the sheriff would have filled the jail of the county, and hired extra prisons in which to incarcerate them. If we are not misinformed, the Chief Justice of the State was one of the signers of a petition to that true and tried patriot, Governor Hicks, to call the Legislature together for the purpose of securing the secession of Maryland; and he would perhaps have presided at the trial, and with a Baltimore or any other Secession mob for a jury, the result may be imagined. In the mean time the Secessionists of that State would have mustered in force; those of Virginia and the other rebellious States would have been encouraged thereby to assail Washington on the other side, whereupon it must have fallen into the hands of the rebels, and the dismemberment of the Union have been surely accomplished.

If there is any person who has been of opinion that the ordinary principles of municipal law are applicable in times of war to bodies of troops under arms for active service; that such troops are governed by martial law on the one hand, so that it is death to refuse obedience to the command of their officers, and by the municipal law on the other, so that they are trespassers, liable to arrest and imprisonment if they do obey; that martial law requires them to arrest spies and traitors, and that the *habeas corpus* immediately requires the commanding officer who has the charge of the military operations of the camp to leave his command for the purpose of making a return before Chief Justice Taney, on penalty of an attachment, fine, and imprisonment if he disobeys,—let him contemplate the practical result to which that doctrine leads, and then say which is the greatest evil, the entire arrest of military operations in time of war by civil process, or the imprisonment of a few persons, more or less, without warrant, some of them, we may admit, being quite innocent, and their imprisonment unjust.



But perhaps some one will say, that the catastrophe supposed could not have taken place ; that General Butler would not have permitted himself and his command to be arrested in that way, but would have effectually resisted the arrest. Quite probable. But if Mr. Chief Justice Taney is right in his positions, it would have been the legal duty of the commander and the men to submit to the arrest, and his and their refusal and forcible resistance would have been an outrage on the law, some fifteen hundred times greater than that of General Cadwalader in declining to bring up his prisoner on the *habeas corpus*. Besides, forcible resistance of a sheriff in the execution of his office is a crime, and the General and all his troops engaged in the resistance would thereby have made themselves liable to imprisonment.

The question has suggested itself, whether General Butler, in occupying the railroad and his places of encampment, was not exercising a right of *eminent domain* merely, and that from the necessity of the case. In one view it may be so regarded. The government may be bound to make compensation. But he was just as much authorized and bound to pursue his march at the peril of any opposing force, and to make arrests without warrant, for the accomplishment of his object, as he was to take private property for the purpose ; and these are martial rights. The case is quite as clear with reference to a military force in a fort, or camp, in time of war. They are bound to military obedience under the penalties of martial law. And if the persons who hold and occupy the military station are under the government of martial law, no persons can come from without, bringing with them a different rule for the government of their actions within its limits. They can have no egress and regress except by permission of the commander or a superior officer, in the shape of a military order. This will doubtless be readily conceded in the case of private persons. But it extends equally to the judges, and, in

the case of a United States military station, even to the Governor of the State in which it is situated. If they enter by permission, they subject themselves to the rule. It is not intended by this that they are enlisted and subject to duty, for martial law does not so order. But it is not quite clear that, in case of an attack, they might not be required to man the defences and do the duty of a soldier. Probably such is the fact. And the service thus performed would not entitle them to an action, either of contract or tort, against the commanding officer. Possibly Mr. Chief Justice Taney would admit that no one but the marshal or sheriff could claim admission, and that he could do so only for the service of process. But if he possessed such a right, as the officer of the municipal law, it would subject the military service in time of war to the interference of any and every one who pleased to sue out writs for the arrest of persons engaged in the military service, or who desired to have an investigation made into the affairs of the station, through the agency of a search-warrant.

The issuing of the process, it may be said, is a matter of right, and, if issued, the sheriff on the receipt of it is bound to obey the command of the writ, if he may rightfully do so. It is nothing to him that the service of his process requires him to enter a military camp, if he has the legal right so to enter. It will not suffice to say that the sheriff should exercise a discretion. The municipal law does not vest him with a discretion. It is nothing to him that the camp is in the vicinity of the public enemy, and that active military operations are hourly expected, — except as this might affect his personal safety. He is bound to serve his process, and for that purpose to search, if necessary. If he is resisted, it is his duty to summon the *posse comitatus*, and to proceed at its head, and with its assistance, in the execution of his duty. — And thus he assaults the camp in the rear, perhaps, while the public enemy attack it in front. Such a right would be entirely antagonistic

to the right of the commander to conduct his military operations, according to the exigencies of the war, without interference.

But all this sinks into insignificance when compared with the mischief which might ensue from the right to have writs of *habeas corpus* executed within military stations, as a matter of right, at the pleasure of all petitioners, or even as a matter resting in the discretion of a judge who has no means of determining whether it can be done without detriment to the public service. In time of war, the warrant of the provost marshal and the writ of *habeas corpus* are antagonistic forces, which cannot subsist together, and the latter must give way; otherwise a party under sentence of a court-martial to be hung as a spy, and upon the gallows with the rope around his neck, may be effectually reprieved by the order of a judge that the commanding officer shall produce the person before him, that the cause of his imprisonment may be inquired into, it being alleged that the conviction was erroneous.

In the present instance, Mr. Chief Justice Taney issued an attachment against General Cadwalader for his contempt in not producing the prisoner on the *habeas corpus*. The marshal returned, that he proceeded, on the 25th of May, to Fort McHenry, for the purpose of serving the writ; that he sent in his name at the outer gate; that the messenger returned with the reply that there was no answer to his card; and that therefore he could not serve the writ as commanded, not being permitted to enter the outer gate;—whereupon the Chief Justice remarked, “It is a plain case, gentlemen; and I shall feel it my duty to enforce the process of the court.” This certainly looked like testing the principle by a practical illustration. But after stating the reasons for ordering an attachment, he remarked:—

“In relation to the present return I propose to say that the marshal has legally the power to summon out the *posse comitatus* to seize and

bring into court the party named in the attachment ; but it is apparent he will be resisted in the discharge of that duty by a force notoriously superior to the *posse comitatus*, and, such being the case, the court has no power under the law to order the necessary force to compel the appearance of the party. If, however, he was before the court, it would then impose the only punishment it is empowered to inflict, — that by fine and imprisonment.”

This is certainly a remarkable collision, only equalled, if equalled, by the case of General Jackson and Judge Hall at New Orleans in the war of 1812.

The Chief Justice declared that, if the general commanding the fort and the military district were before him, he would imprison him, and thus, it seems, deprive the government of his services without regard to consequences. He is withheld from requiring the marshal to summon the *posse*, break into the fort, and capture the commanding general, only by the fact, of which he assumes to take judicial notice, that the marshal would be resisted in the discharge of that duty by a force notoriously superior to the *posse*. He declines to require the marshal to commence another civil war only because he was likely to get the worst of it. But how was he assured of this ? If the marshal had summoned the *posse*, the Secessionists of Maryland would have had a better chance to capture the fort by volunteering under his banner than they are likely to have under any military commander.

If newspaper reports may be trusted, a New York county judge, named Garrison, recently made a demonstration as if he would carry the precedent a little farther. Having issued a *habeas corpus*, in the case of the Police Commissioners of Baltimore, and failing to receive a return of the prisoners before him, he prudently made the inquiry how many men in the county could be mustered as a *posse comitatus* to enforce the process. The answer, that the number might be about fourteen hundred, but that it would require from five

to ten thousand men to effect the object, and that moreover the county was not provided with the necessary artillery, is significant of results, if foolish judges forget that a time of war brings with it other duties and obligations than those which govern in time of peace.\* The circumstance forcibly reminds us of a paragraph in an opinion of a late learned Attorney-General, Mr. Caleb Cushing, in the case of the Sitka, as follows : —

“ I do not mean to say, or to intimate, that the issue of a writ of *habeas corpus* in the present instance was particularly exceptionable, at least in comparison with other cases of more obvious indiscretion in this respect, which daily occur in the United States. But, indeed, if there be anything in the practice of the courts of the States, at the present time, most of all exceptionable, it is the indiscreet levity with which they issue the writs of *habeas corpus ad subjiciendum*, regardless of the old and sound rule, to refuse it when the petition itself shows the absence of good cause, or that the petitioner is lawfully held by some other jurisdiction. (*Ex parte* Kearney, 7 Wheat. 38. *Ex parte* Watkins, 3 Peters, 201. *Ex parte* Milburn, 9 Ib. 704.) That great prerogative writ is now so cheapened by the multitude of hands to which it is committed, and by the consequent abuse of it, that it is itself rapidly degenerating into a mere abuse.” †

We are aware that, when we reason upon legal subjects with a reference to consequences, there are generally those who are ready to say, “ Let consequences take care of themselves, — *Fiat justitia ruat cælum.*” It is to be noted, however, that we do not base our opinions in this case upon any considerations of expediency ; nor upon any necessity which requires that the provisions of the Constitution in favor of private right and personal liberty should be subverted, or even suspended for a time ; nor upon any notion that there are times when he

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\* Since this article was written, Judge Garrison has surrendered to “ inevitable necessity.”

† 7 Opinions of Attorneys-General, 132.

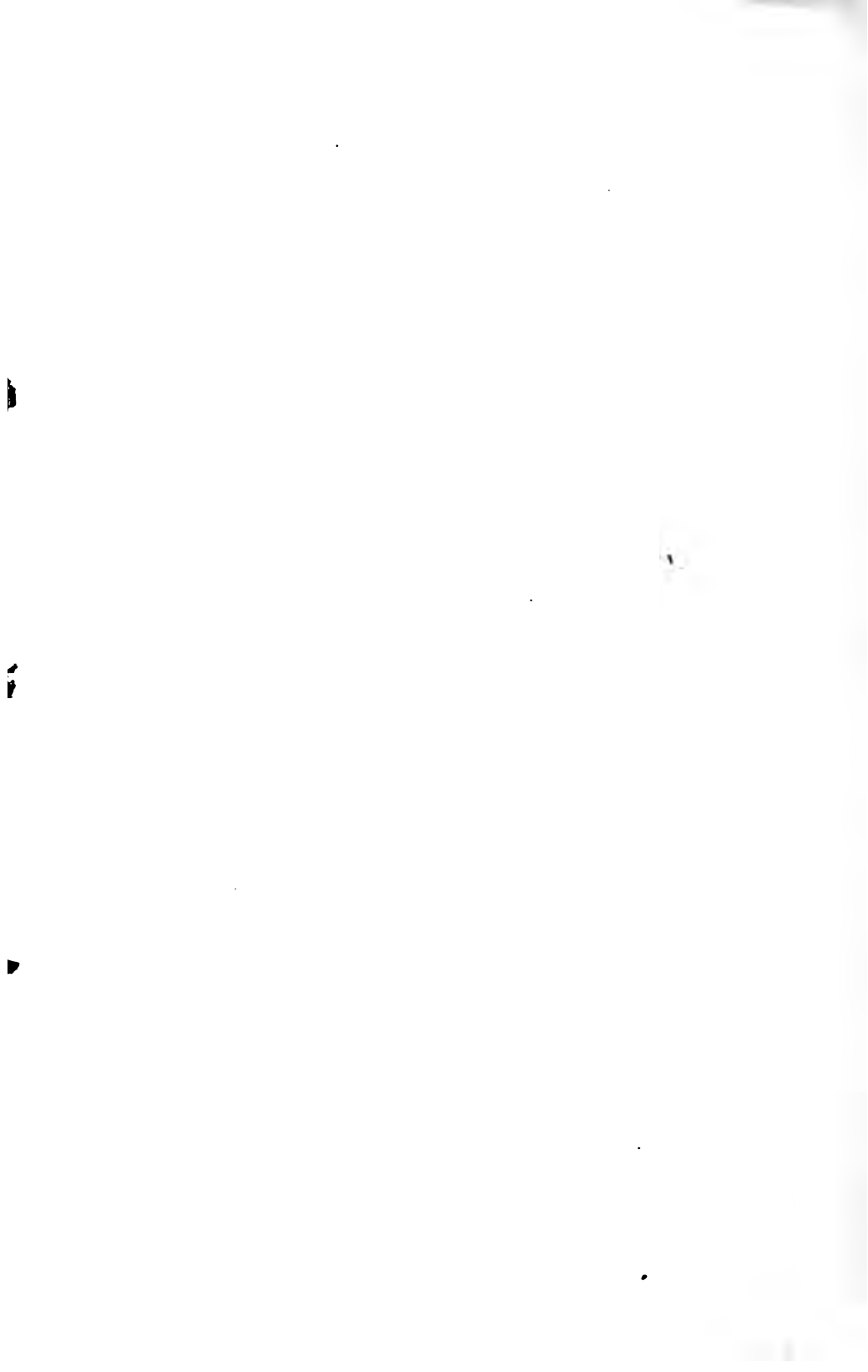
who possesses the power should exercise it for the public good, and take the consequences that may thereby ensue from the violation of private right. Such cases may exist, but we do not rely upon them. Our position is, that the principles we have thus endeavored to maintain are in accordance with the Constitution, and under the Constitution.

Magna Charta and the general principles of the common law, while they recognize and protect private rights, such as the right to be secure from searches and seizures, the right to the *habeas corpus*, and the like, recognize at the same time the necessities of war ; and, in case of actual war, make those rights subservient to the martial law, wherever that exists.

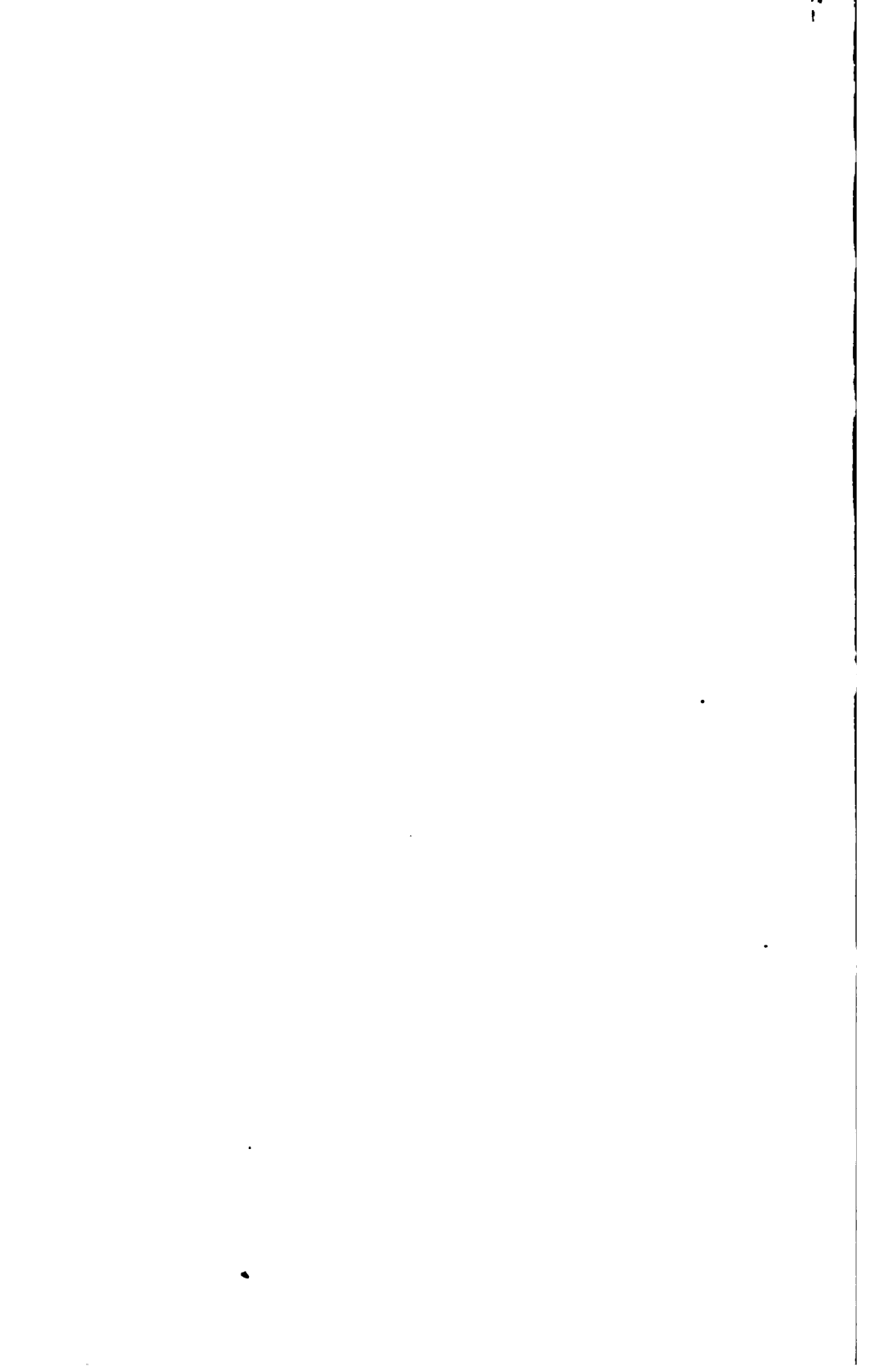
The Constitution of the United States recognizes these private rights, and it confers at the same time the right to make war and to suppress insurrection. This right carries with it, as an incident, the power and right to carry on military operations in the usual mode, and with the usual effect ; to have armies, forts, and camps, and to govern them in time of war, as other nations govern armies and military stations, by martial law ; which, when it comes into existence in time of war, under the constitutional right to make war or to suppress insurrection, is necessarily *the paramount constitutional right and power*, from the nature of the case. It will always be so in practice, whatever might be supposed to be the strict legal right, and we need not shudder, therefore, if we find that the practice is sustained by sound constitutional principles, instead of being a violation of the rights of the citizen.

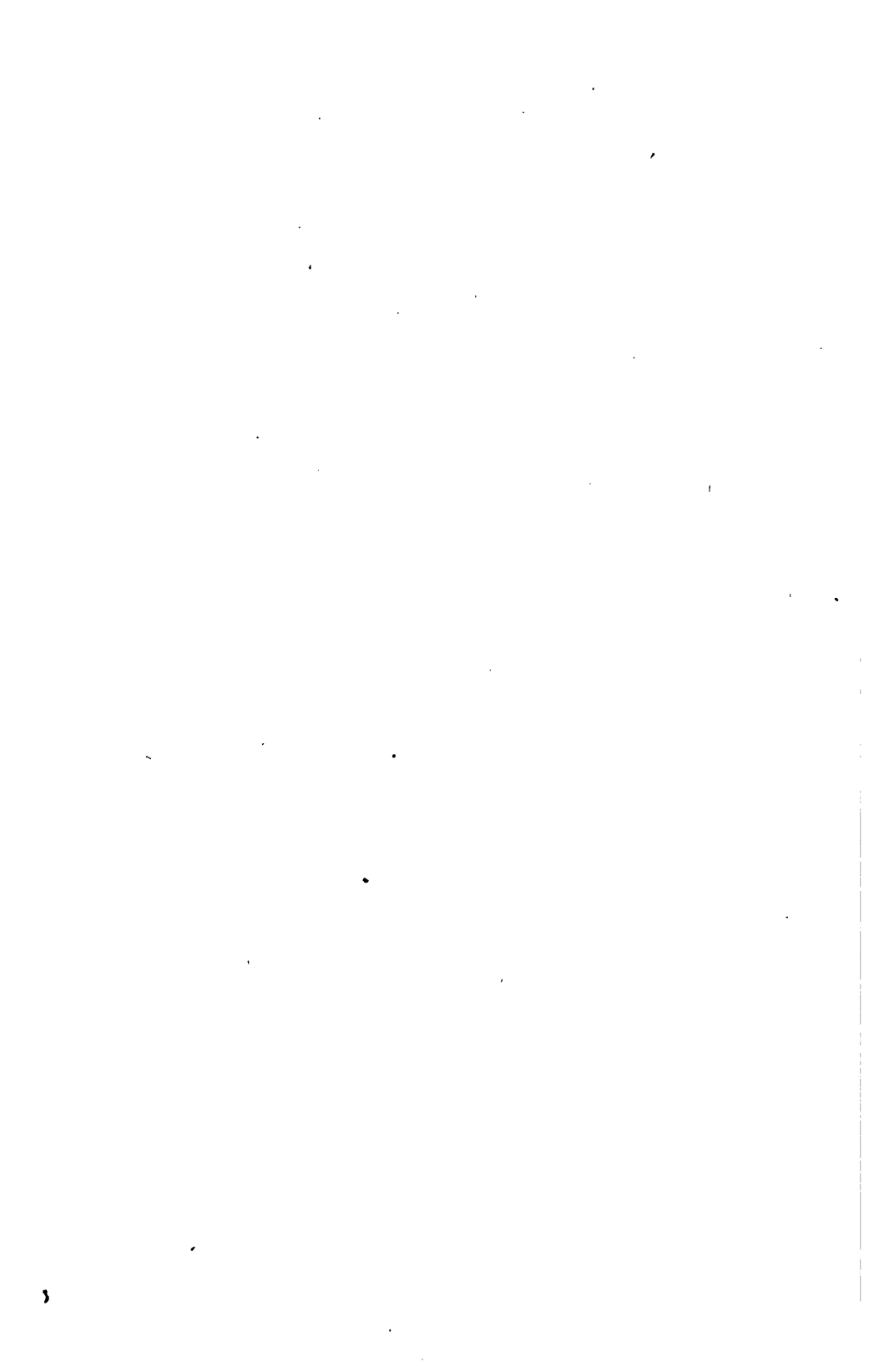
Peace and war cannot exist in the same place at the same time. Let us not murmur if we cannot have peace, with the arts of peace and the rights of peace, at the same time that we are obliged to have war, with the necessities of war and the powers of war. Let us be thankful that it is so seldom that this constitutional martial rule is over us, and that when it is so, its operations are very limited as respects territory,

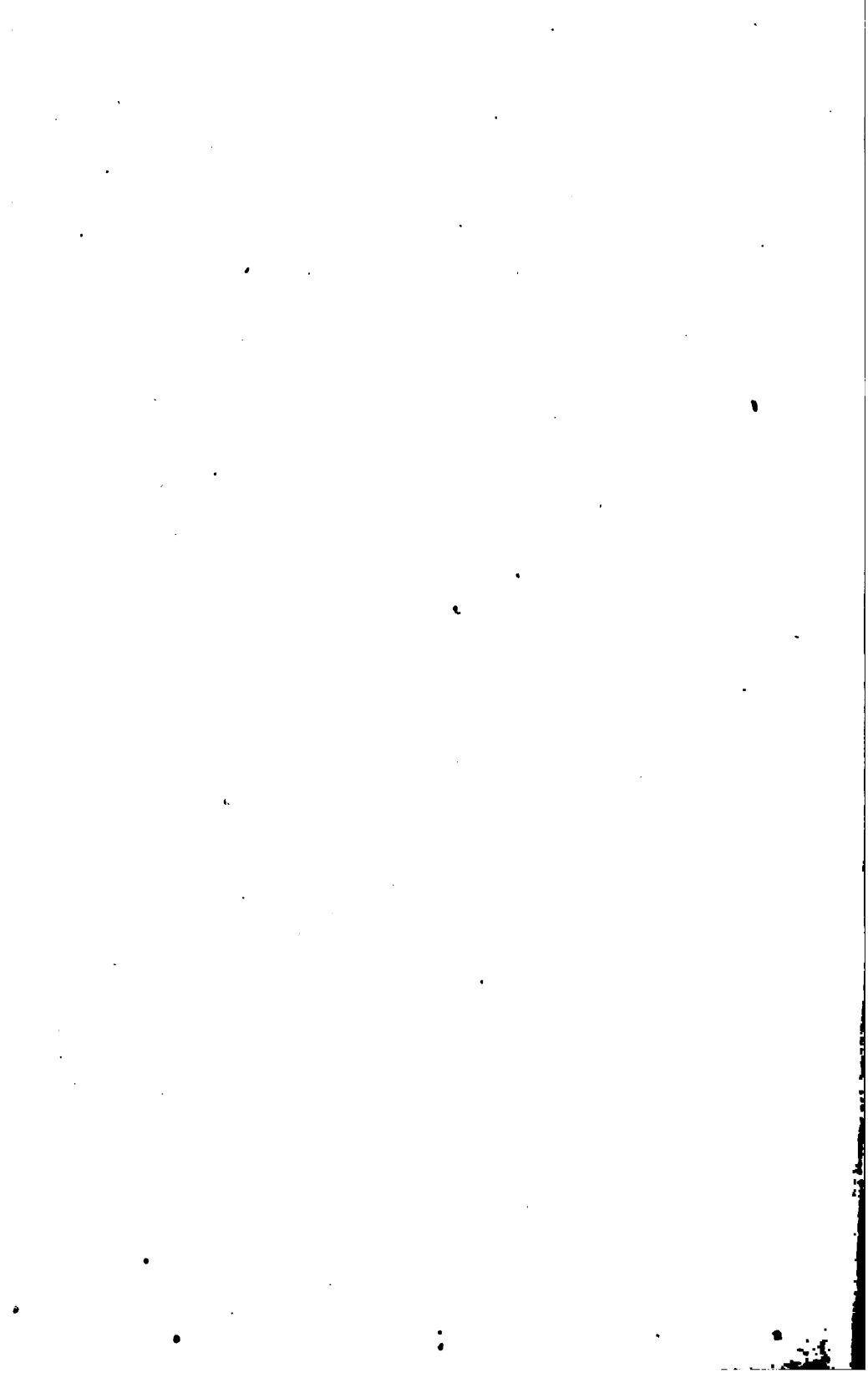
and its powers in regard to persons and property ; and that, in this case, the private inconvenience and suffering are but as the small dust of the balance when compared with the great public good to be obtained by the preservation of the constitutional government of the country.











THE

RIGHT OF SECESSION.

A REVIEW

OF THE MESSAGE OF JEFFERSON DAVIS TO THE CONGRESS  
OF THE CONFEDERATE STATES.

BY JOEL PARKER.

CAMBRIDGE:  
WELCH, BIGELOW, AND COMPANY,  
PRINTERS TO THE UNIVERSITY.

1861.

177 Adm. Amos A. Lawrence  
with respects of  
J. Parker  
Dupl

1861, July 1, 1861  
Guthrie  
James L. Smith, Esq.

MEMORANDUM.—The substance of the argument contained in the following pages was originally delivered as a Lecture to the students in the Law School of Harvard College, in the discharge of the regular duties of the author as Royall Professor of Law in that Institution.

The Editor of the North American Review, desirous of giving it a wider circulation, requested that the matter might be drawn up in the form of an Article adapted to that periodical; in consequence of which it was revised, and is published in the July number of the Review; extra copies being printed for the use of the students of the Law School who were desirous of its publication, and of others who may feel an interest in the subject.

CAMBRIDGE, July 1, 1861.

## THE RIGHT OF SECESSION.

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### "MESSAGE OF PRESIDENT DAVIS."

SUCH is the title of a document which occupies more than four columns of the National Intelligencer of the 7th of May last. It is signed by Jefferson Davis, and purports to have been addressed to the "Gentlemen of the Congress" of the Confederate States, convened by special summons at Montgomery, in the State of Alabama, on the 29th of April, being the second session of the Congress; and to have been prepared in the execution of the duties of the author as President of the Confederation. The reason for the special convocation of the body to which it is addressed is stated to be the "declaration of war made against this Confederacy by Abraham Lincoln, President of the United States, in his proclamation issued on the 15th day of the present month" (April); and in the paragraph which follows this statement the writer speaks of the occasion as "indeed an extraordinary one," which justifies him "in a brief review of the relations heretofore existing between us and the States which now unite in warfare against us, and in a succinct statement of the events which have resulted in this warfare; to the end that mankind may pass intelligent and impartial judgment on its motives and objects."

This document therefore must be regarded as an authoritative exposition of the views entertained by the leaders of

the Confederacy upon the subjects thus indicated. We extract that portion immediately following, which speaks of the former relations of the States.

“During the war waged against Great Britain by her colonies on this continent, a common danger impelled them to close alliance and to the formation of a Confederation, by the terms of which the colonies, styling themselves States, entered ‘*severally* into a firm league of friendship with each other for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to or attacks made upon them or any of them on account of religion, sovereignty, trade, or any other pretence whatever.’

“In order to guard against any misconstruction of their compact, the several States made explicit declaration, in a distinct article, that ‘*each State retains its* sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this Confederation *expressly delegated* to the United States in Congress assembled.’

“Under this contract of alliance the war of the Revolution was successfully waged, and resulted in the treaty of peace with Great Britain in 1783, by the terms of which the several States were *each by name* recognized to be independent.

“The Articles of Confederation contained a clause whereby all alterations were prohibited, unless confirmed by the Legislatures of *every State*, after being agreed to by the Congress; and in obedience to this provision, under the resolution of Congress of the 21st February, 1787, the several States appointed delegates who attended a Convention ‘for the *sole and express purpose* of revising the Articles of Confederation, and reporting to Congress and the several Legislatures such alterations and provisions therein as shall, when agreed to in Congress *and confirmed by the States*, render the Federal Constitution adequate to the exigencies of government and the preservation of the Union.’

“It was by the delegates chosen by the several States, under the resolution just quoted, that the Constitution of the United States was framed in 1787, and submitted to the *several States* for ratification, as shown by the 7th article, which is in these words: —

“‘The ratification of the *Conventions of nine States* shall be sufficient for the establishment of this Constitution *BETWEEN the States* so ratifying the same.’

“I have italicized certain words in the quotations just made, for the purpose of attracting attention to the singular and marked caution with which the States endeavored, in every possible form, to exclude the idea that the separate and independent sovereignty of each State was merged into one common government and nation ; and the earnest desire they evinced to impress on the Constitution its true character,—that of a *compact BETWEEN* independent States.

“The Constitution of 1787 having, however, omitted the clause already recited from the Articles of Confederation, which provided in explicit terms that each State retained its sovereignty and independence, some alarm was felt in the States, when invited to ratify the Constitution, lest this omission should be construed into an abandonment of their cherished principle, and they refused to be satisfied until amendments were added to the Constitution placing beyond any pretence of doubt the reservation by the States of all their sovereign rights and powers not expressly delegated to the United States by the Constitution.

“Strange indeed must it appear to the impartial observer, but it is none the less true, that all these carefully worded clauses proved unavailing to prevent the rise and growth in the Northern States of a political school which has persistently claimed that the government thus formed was not a compact between States, but was in effect a National Government, set up above and over the States. An organization, created by the States to secure the blessings of liberty and independence against foreign aggression, has been gradually perverted into a machine for their control in their domestic affairs ; the creature has been exalted above its creators ; the principals have been made subordinate to the agent appointed by themselves.”

We copy also the “succinct statement of the events which have resulted in this warfare,”—in other words of the aggressions on the part of the Northern States and people, and of the grievances endured by the South,—and add what seems to be stated as the foundation and justification of the remedy for those grievances, all which is in these words:—



"The people of the Southern States, whose almost exclusive occupation was agriculture, early perceived a tendency in the Northern States to render the common government subservient to their own purposes, by imposing burdens on commerce as a protection to their manufacturing and shipping interests. Long and angry controversy grew out of these attempts, often successful, to benefit one section of the country at the expense of the other; and the danger of disruption arising from this cause was enhanced by the fact that the Northern population was increasing by immigration and other causes in a greater ratio than the population of the South. By degrees, as the Northern States gained preponderance in the National Congress, self-interest taught their people to yield ready assent to any plausible advocacy of their right as a majority to govern the minority without control: they learned to listen with impatience to the suggestions of any constitutional impediment to the exercise of their will; and so utterly have the principles of the Constitution been corrupted in the Northern mind, that in the inaugural address delivered by President Lincoln in March last he asserts, as an axiom which he plainly deems to be undeniable, that the theory of the Constitution requires that in all cases the majority shall govern; and, in another memorable instance, the same Chief Magistrate did not hesitate to liken the relations between a State and the United States to those which exist between a county and the State in which it is situated and by which it is created. This is the lamentable and fundamental error on which rests the policy that has culminated in his declaration of war against these Confederate States.

"In addition to the long-continued and deep-seated resentment felt by the Southern States at the persistent abuse of the powers they had delegated to the Congress, for the purpose of enriching the manufacturing and shipping classes of the North at the expense of the South, there has existed for nearly half a century another subject of discord, involving interests of such transcendent magnitude as at all times to create the apprehension in the minds of many devoted lovers of the Union that its permanence was impossible.

"When the several States delegated certain powers to the United States Congress, a large portion of the laboring population consisted of African slaves imported into the colonies by the mother country. In twelve out of thirteen States negro slavery existed, and the right of

property in slaves was protected by law. This property was recognized in the Constitution, and provision was made against its loss by the escape of the slave. The increase in the number of slaves by further importation from Africa was also secured by a clause forbidding Congress to prohibit the slave-trade anterior to a certain date; and in no clause can there be found any delegation of power to the Congress authorizing it in any manner to legislate to the prejudice, detriment, or discouragement of the owners of that species of property, or excluding it from the protection of the government.

"The climate and soil of the Northern States soon proved unpropitious to the continuance of slave labor, whilst the converse was the case at the South. Under the unrestricted free intercourse between the two sections the Northern States consulted their own interest by selling their slaves to the South and prohibiting slavery within their limits. The South were willing purchasers of a property suitable to their wants, and paid the price of the acquisition without harboring a suspicion that their quiet possession was to be disturbed by those who were inhibited, not only by want of constitutional authority, but by good faith as vendors, from disquieting a title emanating from themselves.

"As soon, however, as the Northern States that prohibited African slavery within their limits had reached a number sufficient to give their representation a controlling voice in the Congress, a persistent and organized system of hostile measures against the rights of the owners of slaves in the Southern States was inaugurated, and gradually extended. A continuous series of measures was devised and prosecuted for the purpose of rendering insecure the tenure of property in slaves: fanatical organizations, supplied with money by voluntary subscriptions, were assiduously engaged in exciting amongst the slaves a spirit of discontent and revolt; means were furnished for their escape from their owners, and agents secretly employed to entice them to abscond; the constitutional provision for their rendition to their owners was first evaded, then openly denounced as a violation of conscientious obligation and religious duty; men were taught that it was a merit to elude, disobey, and violently oppose the execution of the laws enacted to secure the performance of the promise contained in the constitutional compact; owners of slaves were mobbed, and even murdered in open

day, solely for applying to a magistrate for the arrest of a fugitive slave; the dogmas of these voluntary organizations soon obtained control of the Legislatures of many of the Northern States, and laws were passed providing for the punishment by ruinous fines and long-continued imprisonment in jails and penitentiaries of citizens of the Southern States who should dare to ask aid of the officers of the law for the recovery of their property. Emboldened by success, the theatre of agitation and aggression against the clearly expressed constitutional rights of the Southern States was transferred to the Congress; Senators and Representatives were sent to the common councils of the nation, whose chief title to this distinction consisted in the display of a spirit of ultra fanaticism, and whose business was, not 'to promote the general welfare or insure domestic tranquillity,' but to awaken the bitterest hatred against the citizens of sister States by violent denunciation of their institutions; the transaction of public affairs was impeded by repeated efforts to usurp powers not delegated by the Constitution, for the purpose of impairing the security of property in slaves, and reducing those States which held slaves to a condition of inferiority. Finally, a great party was organized for the purpose of obtaining the administration of the government, with the avowed object of using its power for the total exclusion of the Slave States from all participation in the benefits of the public domain, acquired by all the States in common, whether by conquest or purchase; of surrounding them entirely by States in which slavery should be prohibited; of thus rendering the property in slaves so insecure as to be comparatively worthless, and thereby annihilating in effect property worth thousands of millions of dollars. This party, thus organized, succeeded in the month of November last in the election of its candidate for the Presidency of the United States.

"In the mean time, under the mild and genial climate of the Southern States, and the increasing care and attention for the well-being and comfort of the laboring class, dictated alike by interest and humanity, the African slaves had augmented in number from about 600,000, at the date of the adoption of the constitutional compact, to upwards of 4,000,000. In moral and social condition they had been elevated from brutal savages into docile, intelligent, and civilized agricultural laborers, and supplied not only with bodily comforts, but with careful religious

instruction. Under the supervision of a superior race, their labor had been so directed as not only to allow a gradual and marked amelioration of their own condition, but to convert hundreds of thousands of square miles of the wilderness into cultivated lands, covered with a prosperous people; towns and cities had sprung into existence, and had rapidly increased in wealth and population under the social system of the South; the white population of the Southern slaveholding States had augmented from 1,250,000 at the date of the adoption of the Constitution, to more than 8,500,000 in 1860; and the productions of the South in cotton, rice, sugar, and tobacco, for the full development and continuance of which the labor of African slaves was and is indispensable, had swollen to an amount which formed nearly three fourths of the exports of the whole United States, and had become absolutely necessary to the wants of civilized man.

"With interests of such overwhelming magnitude imperilled, the people of the Southern States were driven by the conduct of the North to the adoption of some course of action to avert the danger with which they were openly menaced. With this view, the Legislatures of the several States invited the people to select delegates to Conventions to be held for the purpose of determining for themselves what measures were best adapted to meet so alarming a crisis in their history.

"Here it may be proper to observe, that from a period as early as 1798 there had existed in all of the States of the Union a party, almost uninterruptedly in the majority, based upon the creed that each State was, in the last resort, the sole judge as well of its wrongs as of the mode and measure of redress. Indeed, it is obvious that under the law of nations this principle is an axiom as applied to the relations of independent sovereign states, such as those which had united themselves under the constitutional compact. The Democratic party of the United States repeated in its successful canvass in 1856 the declaration made in numerous previous political contests, that it would 'faithfully abide by and uphold the principles laid down in the Kentucky and Virginia Resolutions of 1798, and in the report of Mr. Madison to the Virginia Legislature in 1799; and that it adopts those principles as constituting one of the main foundations of its political creed.'

"The principles thus emphatically announced embrace that to which I have already adverted, the right of each State to judge of and redress the wrongs of which it complains. These principles were maintained by overwhelming majorities of the people of all the States of the Union at different elections, especially in the elections of Mr. Jefferson in 1805, Mr. Madison in 1809, and Mr. Pierce in 1852.

"In the exercise of a right so ancient, so well established, and so necessary for self-preservation, the people of the Confederate States in their Conventions determined that the wrongs which they had suffered and the evils with which they were menaced required that they should revoke the delegation of powers to the Federal Government which they had ratified in their several Conventions. They consequently passed ordinances resuming all their rights as sovereign and independent States, and dissolved their connection with the other States of the Union."

Our especial purpose at this time is, not to inquire into the truth of the allegation that the President of the United States had made a declaration of war in his proclamation, nor to consider how far the grievances alleged have any substantial foundation regarded as accusations against the government of the Union, nor to show how the freedom and material prosperity of the people who make the complaint have been protected and secured by the government which they now assail.

That we may not, however, be supposed to concede by silence that President Lincoln's proclamation can in any just sense be regarded as a declaration of war, or a commencement of hostile measures, we refer the reader to the proclamation itself, and to certain significant words of one L. P. Walker, claiming to be Secretary of War of the Confederate States, uttered at Montgomery on the evening of the day on which the bombardment of Fort Sumter commenced, which was three days before President Lincoln's proclamation was issued. They may be found in another column of the number of the National Intelligencer which contains the "Message." Serenaded in celebration of that joyous occasion, and declining

to make a speech when thus called out, the War Secretary, in the language of the telegraphic despatch,

"in a few words of electrical eloquence told the news from Fort Sumter, declaring, in conclusion, that before many hours the flag of the Confederacy would float over that fortress. *'No man,' he said, 'could tell where THE WAR THIS DAY COMMENCED would end, but he would prophesy that the flag which now flaunts the breeze here would float over the dome of the old Capitol at Washington before the first of May. Let them try Southern chivalry and test the extent of Southern resources, and it might float eventually over Faneuil Hall itself.'*"

If any one is curious to inquire into the truth and justice of the grievances alleged as a justification for the attempted secession, we must refer him, for the present, to the contemporary history, as found in the various publications of the day.

There is not before us at this time any question how far these alleged grievances, if true, might justify revolution. The right of revolution is now generally admitted by all who sustain the political dogma, that the people have a right to govern themselves. But while revolution seems thus to be well admitted as a right, the persons by whom, and the limits within which, the right may be exercised, have not thus far been very explicitly or accurately designated and defined. The generalizations which usually accompany the admission of the right, seem to require for its rightful exercise causes of the gravest character, without any distinct enumeration of those which should be regarded as sufficient; they assert its existence in the people, without specifying what classes of the whole population are entitled to that character, or what portion of the persons known as the people may exercise the right; and they insist upon a right of reform, without indicating very precisely what should be the legitimate objects of the reformation. — It must be admitted, that in all these particulars accuracy of specification and limitation is difficult, not to say impossible; and yet to revolution regard-

ed as a *right*, there must be some limit, not very sharply defined, perhaps, beyond which the right does not extend. The *right* of revolution does not exist in all cases where the *power* of revolution is found. We may remark, before proceeding to our main purpose, that if the right of revolution may be exercised because portions of the community maintain the opinion, that the clause of the Declaration of Independence which asserts that all men are created equal and endowed by their Creator with certain unalienable rights, embraces all human beings of whatever color or race, and denounce in round terms the dogmas of those who maintain that human slavery is a suitable foundation upon which to erect a republican government, some of them even contending manfully that slaveholding is a sin; or because strenuous efforts have been made by individuals to prevent the extension of slavery into the Territories, where it has no right to enter; or because a President has been elected who is not a slaveholder, nor the tool of those who sustain that patriarchal relation; — then the time may have arrived when the existing republic of the United States ought to be subverted by those at the South who are thereby aggrieved. — If a small minority of the whole people in a government, being the active agitators in a certain section, may lawfully exercise the right of revolution, through the instrumentality of misrepresentation and terrorism combined, then the active leaders of the attempted secession may come within the denomination of “the people,” in whom the right is admitted to exist. — If the right may lawfully be exercised for the purpose of taking from the great body of the people who possess it the power of regulating their own affairs, and of placing that power in the hands of a few, to be held by them for the purposes of their own ambition, then the attempted disruption of the Union may have a legitimate political purpose. — And if, through revolution, a government may with propriety be founded, having human slavery for its corner-stone, then the intelligent and

impartial judgment of the civilized world may sanction the proceedings which have resulted in the formation of this Confederation of the Southern States ; — not otherwise.\*

But Mr. Jefferson Davis and his compeers of the Confederate Congress do not base their action upon this right of revolution, which asserts itself in antagonism to the existing government, and seeks its overthrow, or its subversion to the extent covered by the antagonism, against the will and the right of the government to oppose it. If they did, they would stand at present, upon their own admission, as rebels against the government of the United States ; for it must be borne in mind, that this right of revolution is such an imperfect right that its very character of *revolution* depends upon the ultimate success of those who attempt to exercise it. It is strictly a personal right, “the right of the people to alter or abolish the government.” *It does not exist as the right of a State*, or of any political organization, although such organization may be used for the more effectual exercise of it. In the inception of any effort to exert this right, all the action taken under it is insurrection and treason ; — so known to the law ; and so treated in fact, at the pleasure of the government assailed, until the insurrection has established itself, by the assertion of the right and the manifestation of a sufficient power to sustain it.

The Confederates do not set up, or attempt, a justification which would place them in the position of traitors on their own admission. On the contrary, they claim, under shelter of State authority, to withdraw from the Union by a State action, not having the character of an antagonism which the government may rightfully oppose and subdue, but the character of a peaceful withdrawal, which, on their political theory, the government ought to allow, because it is a political right, and it would seem, according to their notions, a perfect right.

The right of secession is asserted as a *State right*, consistent



with the Constitution, and founded upon it, or upon the history preceding it, and the circumstances attending its formation and adoption;—a right to be exercised only through State action, and to be made effectual by a peaceful declaration of the fact of secession, which of itself accomplishes the separation of the State from the Union; any forcible opposition to it on the part of the United States being usurpation and oppression. Its theory, as stated in the document before us, and more at large in the speeches and writings of its paternal ancestor, is, that the Constitution of the United States is a compact, or agreement, entered into by the several States, as sovereign communities, by which the States created a government with certain limited powers, all powers not delegated to it, nor prohibited to the States, being reserved to the States respectively, or to the people;—that, the States being parties to the compact, each may judge for itself whether its obligations have been fulfilled, and the means and measure of redress required for any infraction of it, because there is no common arbiter or judge to settle disputes between the parties to it on such subjects;—and that if, in the judgment of any State the proper remedy for a violation of the compact is secession from the Union, such State may rightfully sever the connection by a declaratory act for that purpose, and that thereby the fact of secession is accomplished without revolution. Acting upon this assumption, the mode adopted for severing the connection, by the conventions in the several States which have attempted to secede, has been a formal repeal of the acts ratifying the Constitution of 1788, and of acts by which the State became a member of the Union, and by declaring the union subsisting between the seceding State and the United States dissolved. We propose at this time to discuss the soundness of these positions.

In determining whether such a right exists, we naturally turn in the first instance to the Constitution itself. But it is clear that this instrument contains no provision to that

effect, in terms, nor any one which suggests such a result by any direct implication. It purports to be an organic and supreme law, limited as to its objects, and of course in its powers; and it appears to be framed on the model of the State constitutions, following their general principles so far as the objects to be attained and the limited powers granted will permit. The government organized under it is formed through the instrumentality of the Constitution itself, as a fundamental law enacted by "We, the people of the United States"; and not one formed by the States, or one which when formed represents the States; although from the previous existence of the States, as sovereign communities, except so far as they were bound by the Articles of Confederation, the Constitution could not be adopted without the assent and sanction of the several States;—for which reason, and because the States were still to exist, the ratifications were by "the people" of each State. In no instance was it supposed that the existing State government could make the necessary ratification as a State act. It provides for the organization of Legislative, Executive, and Judicial departments, and the powers of these departments are to be exercised like similar powers under the State constitutions, and in a manner to control all State action within their proper sphere. The powers of the government organized under it usually act directly upon the people of the whole country, as the powers of the State government act upon all the people of the State; sometimes with reference to geographical or State lines, as the powers of the State government act with regard to county, town, or city limits. In general, none of these departments are indebted to State authority in their organization. They do not derive their powers from the States, nor represent States, nor act through any State agency, or as trustees of any powers for State purposes, or of powers dependent for their existence upon any State organization. The excepted cases—if the election of Senators by State Legislatures, requisitions upon

States for their quota of militia to suppress insurrection, and the rendition of fugitives from justice, by the action of the State executive, may be supposed to be exceptions — are not founded upon any idea that State authority is a controlling force in the government of the United States, but exist for special reasons applicable to the particular instances; — that of the election of Senators being designed to guard against too great a preponderance of the larger States in the national councils; that in relation to the militia being a matter of convenience, because the militia is officered, and mainly organized, through the action of the several States; and that of the rendition of fugitives from justice arising from the fact that it is a matter between the State demanding and that rendering, rather than one which concerns the general welfare. State lines furnish convenient divisions for the purposes of the government; and in many instances, doubtless, State pride and State interests have had a controlling influence, shaping the provisions of the Constitution and laws so that State prosperity would be subserved; but this is merely incidental, through the action of individuals. It is none the less true, that the States have no control over any of the departments of the general government. They do not direct their action, in the first instance, nor is there, by the Constitution, any appeal to State judgment, or State sanction, through which errors are corrected, or the action of the departments is affirmed or reversed. In the matter of the election of Senators, before adverted to, reliance is placed upon State action, and if no such action was had, for a sufficient length of time, a Senate could not be organized. But so it would be in a State, if no State senators were elected. That there is nothing peculiar in the government of the United States, in this regard, is evident from the fact, that if one or a dozen of the States should refuse or neglect to elect Senators, the Senate would be organized legally, notwithstanding the omission.

At the same time that there is nothing to show that the

States, as such, have any control over the United States, or the government established under the Constitution, that instrument is full of provisions by which the States are prohibited from the exercise of powers which they would otherwise possess, and their authority as States is made subject and subordinate to the authority of the United States. In many important particulars, to the extent to which powers are granted to the government established by the Constitution, to the same extent the sovereignty of the States is expressly taken away; the powers granted being exclusive in the United States. In other particulars this is so by a necessary implication, because a power being expressly granted to the United States, the exercise of a similar power by a State would be inconsistent with the grant.

The Constitution declares that itself, the laws of the United States made in pursuance of it, and treaties made under its authority, shall be the supreme law of the land, by which the judges of every State shall be bound, anything in the laws or constitution of the State to the contrary notwithstanding. It is a perversion of terms to call the "supreme law of the land" a compact between the States, which any State may rescind at pleasure. It is not itself an agreement, but is the result of an agreement. And in the absence of an express declaration, or reservation, it is an entire subversion of all legal principles to maintain that the subordinate may at pleasure set itself free from the restrictions imposed upon it by the fundamental law constituting the superior, even if the subordinate have in other particulars an uncontrolled authority. The judges of each State being expressly bound by the Constitution and laws of the United States, anything in the constitution or laws of the State to the contrary, how can a State law (or ordinance, which is but another name for a law) relieve them from the obligation? And if they are bound, the State and the people are bound also. The judges are expressly named, the more surely to prevent a conflict of jurisdiction and decision.

The clause of the Constitution providing for amendments adds another to the arguments which show it to have the character of an organic law, and not of a compact. Whether regarded as the one or the other, it is clear that it could not become obligatory upon a State, or the people of a State, until adopted by them. The people of one State could not ratify and adopt it for the people of another State. But, being adopted by all, it contains a clause binding upon all, providing that "the Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to the Constitution, or, on application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress."

Now, considered as an organic law, the Constitution may be altered and amended in any mode which may be agreed upon and prescribed by the instrument itself; and this is a mode by which, through the action of certain political bodies, and certain legislative or popular majorities of a required number, the whole people are represented in the adoption of amendments, which become parts of the organic law. This mode, rather than a direct vote of the whole people, was doubtless agreed upon in order to make reasonable assurance that no amendment should be adopted affecting the rights and interests of the States, except by such a concurrence of State action as would fairly guard State interests, at the same time that there was a suitable representation of the whole people. It may be regarded as combining a representation of the States and of the people. It is an exemplification of the democratic dogma that the majority represent and express the will of the people, — the mode of expression provided in this case being supposed to be that best adapted to the particular purpose.

But if the Constitution is a compact between the States, any

amendment which becomes a part of the Constitution is also a compact between the States, and the question arises, How is it that three fourths of the States, voting in favor of an amendment, are to make a compact with the other fourth, voting at the same time against it, and thus refusing to enter into the compact? How is it that the States voting to adopt, represent the States refusing to adopt, so that, by the vote of adoption, they make a compact between themselves and the others, against the will of the others expressed at the same time. Those voting to adopt act in their own behalf, thereby being one party to the bargain, and thus far it is well; but, on the compact theory, they must at the same time represent those who vote against the adoption, and thus make them another party to the bargain; when the others at the same time represent themselves, and refuse to make the bargain. Or if we state the compact theory with somewhat more of precision, each State is a party to the compact, agreeing with all the others, and one agrees with all the others notwithstanding she and several of the others refuse to agree. Thus, South Carolina, for instance, votes against a proposed amendment, and thereby refuses to enter into the new compact, but does still become a party to that compact, and agrees with the other States to adopt it, being represented by the others, several of them also voting against it, and at the same time not only making the contract for themselves, but aiding in making it for South Carolina also.

Will the advocate of the compact theory say that the provision relative to amendments, in the Constitution as first adopted, constitutes the States *agents* of one another, so that three fourths of the whole number may thus make an agreement for all, against the will of their principals, acting at the same time and dissenting? If this is so, we must add a new chapter to the law of Agency.

But without extending the argument, two or three illustrations may serve to exemplify the utter absurdity of a construction of the Constitution which should sanction the alleged right of secession.

The judicial department is rightfully divided into circuits and districts, embracing several States in a circuit, and mainly limited by State lines; not because the States have any control of the courts, but because State lines furnish convenient limits for such circuits and districts, except when there is a necessity for districting a State. Suits are instituted from time to time in these courts, questions are tried, verdicts are rendered, judgments entered, and cases are carried from these courts, and also from the State courts in certain cases, to the Supreme Court of the United States, sitting at Washington for the correction of errors. Now suppose a State is allowed to secede at its pleasure, what is the effect? If it may do so rightfully, then the judicial department of the United States holds all its powers, and even its existence, practically, within the limits of any State, at the pleasure of that State; for all its action is arrested at the point of time when the State pleases to secede. The witness on the stand is stopped in the midst of his testimony, on the passage of the act of secession; the juror, who has been sworn to try the case, goes his way without rendering a verdict; appeals are summarily and effectually dismissed, and writs of error quashed, by a nullification of the jurisdiction of the Supreme Court; the property seized by the marshal upon execution drops from his grasp; he and the district judge are removed from office; the State makes a general jail delivery of United States prisoners within her limits; and the pirate and murderer, under sentence of death, rejoice in a secession pardon. There is no escape from these conclusions.

The power to make treaties is, by the Constitution, vested in the President, with the advice and consent of the Senate, who may lawfully, in virtue of that power, enter into stipulations with foreign nations, which can be executed, according to their terms, only within the limits of a particular State. Suppose a treaty with Great Britain, containing a stipulation by which, in consideration of a concession by her of a right

to American citizens to navigate the Thames, her subjects should have a similar right to navigate the Hudson, for a term of years; with various other stipulations relative to matters of high political and commercial interest having a connection with this stipulation, or entered into in consequence of that agreement. It is an entire compact consisting of several parts. That treaty exists at the pleasure of the State of New York, which, although she cannot by any direct act close the navigable waters within her limits, may by an act of secession deprive British subjects of their rights under the treaty, and thus effectually break it, and by the infraction give Great Britain just cause for war,—not against her, for she did not make the compact, and merely exercises her lawful right,—but against the United States. If such may be the result, all treaties ought to contain a provision for a peaceable termination of their provisions on the secession of any State.

Not to multiply instances of the superlative folly of such an interpretation of the Constitution, let us make one more supposition. The debt which must be contracted in suppressing the present insurrection is likely to be large; Mississippi would be willing to repudiate her share, and Mr. Jefferson Davis would doubtless justify her in so doing, although she and he have had a large agency in causing it to be contracted. Suppose, instead of such a catastrophe, that all the States except New Hampshire, Vermont, Rhode Island, New Jersey, and Delaware should secede, and thus relieve their people from the obligation of the debt. The States named, remaining loyal and true, and in such case constituting the United States, would have rather a large load to carry, considering their resources and means of payment; but the burden must, by legitimate consequence, fall upon their shoulders, as they could not tax the people of the seceding States, nor very conveniently concentrate their forces so as to compel a contribution. We should ask pardon of the other loyal States for stating this supposition, were it made otherwise than as an effective illustration.



These considerations may be sufficient to show that the Constitution itself, considering it as a fundamental law, can contain no principle of action, nor recognize any principle, or action, by which its full operation, over all parts of the States embraced within the government, may be limited or subverted by State authority. Regarding the Constitution as a law, probably no one can be found, at the present day, to contend for the right of secession.

Let us now consider the argument upon the supposition that the Constitution has the character of a compact between the States.

Our first remark is, that, assuming it to be a compact between the States, with a right of secession attached, the same absurd consequences will follow which have already been suggested. A compact constituting a national judiciary, any circuit or district of which may be cut off in the manner and with the effect which is shown to attend the secession of a State, or one authorizing the formation of a treaty, binding upon all the parties, but which any one of the States can break at pleasure, leaving the responsibility for the breach upon the others, would be a most absurd compact. It is not therefore to be presumed that such a compact exists, but its existence must be proved by indubitable evidence; and we turn to the history preceding and attending the formation of the Constitution, to ascertain whether the States have any sovereign right to break the contract by which they associated themselves together for the purpose of a general government.

The political relations of the people of this country have had a twofold character from the commencement of the Revolution, and even from the early settlement of the Colonies, and there has been no time when any State has been at liberty to act with perfect freedom as a sovereign State. The Colonies were in most instances separate, and independent of each other, managing their local affairs, but all under the general jurisdiction and government of the mother country. They

confederated together for the purposes of the common defence, at first as a council, without articles of agreement, to take into consideration their actual condition, and the differences subsisting between them and Great Britain. The Declaration of Independence shows the union which then existed between them as "one people," but still exhibits to some extent this twofold character. It was made, not by separate Colonies, or States, or governments, but by all united, and for all united. This is shown in the introduction, and in the recital of grievances; and the specific declaration with which it closes is that of an entire people. It commences, "When it becomes necessary for *one people* to dissolve the political bands which have connected them with another people." The grievances alleged are the common grievances of all. The allegations against the king of Great Britain are, among other things, that "he has combined with others to subject *us* to a jurisdiction foreign to *our* constitutions and unacknowledged by *our* laws." The recital of remonstrances is of the same character. "*We* have petitioned for redress in the most humble terms; *our* repeated petitions have been answered only by repeated injury." This form of phraseology, which is found throughout, was not accidental. The declaration was "the unanimous declaration of the thirteen United States," or rather "of the good people of these Colonies"; but it was declared, not that the "United Colonies" are a free and independent nation, but that they are free and independent *States*, thus recognizing their separate existence, which has never been questioned. They were States, however, which were united, as if *one*, for the purposes for which Congress was assembled, but with imperfect authority to effect the purposes for which they were thus united.

This lack of authority led to the Articles of Confederation. They were reported in Congress, July 12, 1776, agreed to by the delegates, and proposed for ratification, November 15, 1777; ratified by the delegates of several States, authorized

for that purpose, July 9, 1778, and by others from time to time, the last ratification being that of Maryland, March 1, 1781. These articles, without doubt, formed a compact. The third article expressly declares that "the said States hereby enter into a firm league," "binding themselves to assist each other."

There was no regular legislative, executive, or judicial department, but to some extent the articles conferred upon the Congress assembled under them powers of a national character; such as the power of determining on peace and war, with certain exceptions; of entering into treaties, granting letters of marque and reprisal, appointing courts for the trial of piracies and felonies committed on the high seas, and other powers, comprising legislative, executive, and judicial functions. They contained divers limitations upon the powers which each of the States would otherwise have possessed, so that the action of the States should not interfere with that of Congress; and they imposed certain duties upon the States. As these Articles remained in full force up to the time of the adoption of the Constitution, it is in no sense true that the States at and immediately before that adoption were in all respects sovereign States. The second Article, in these words, "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this Confederation expressly delegated to the United States in Congress assembled," admits that to that extent they had parted with their sovereignty. By the thirteenth article, it was agreed that "every State shall abide by the determination of the United States in Congress assembled, on all questions which by this Confederation are submitted to them."

Now, with this admitted character of a compact, it is quite clear that no State, after the adoption of the Articles, could secede at pleasure from the Confederation. So far from it, no one could retire without the assent of all the rest.

Waiving for the present the consideration of the particular

provisions of the Articles, which show this conclusively, and examining the case as it is presented by the character of the Articles as above set forth, it is perfectly apparent that there was no right of secession. It is the nature of a contract to be binding upon the parties according to its terms, and the scope and operation it was designed to have. This compact prescribed duties to the States, and gave powers to the Congress. The purposes which were to be effected by it were of indefinite continuance. The duties of the States were without limitation of time. The powers of Congress were of the same character. Each party to the compact had duties to perform, and could not withdraw itself until those duties were discharged. Such are the legal rules in relation to contracts generally. And if this is true of the Articles of Confederation, it must be at least equally true of the Constitution itself, regarding it as a compact substituted for the Articles.

But it is alleged that this compact has been broken by some of the parties to it in divers particulars, principally relating to slavery, and that the other parties are therefore no longer bound by it, but may withdraw from further performance on their part. If we were to admit the breach as alleged, the conclusion does not follow. There are cases in which, on the failure or refusal of one party to a contract to perform his part of it, the other party may treat the contract as rescinded. But this case is not within that rule; for it is equally well settled, as a general rule, that one party cannot treat a contract as rescinded unless all the parties can be placed in the condition in which they were before they entered into it, and that if there has been a partial performance, from which one party has derived a benefit, he cannot retain what he has received, and treat the contract as rescinded by reason of any failure or refusal of another party to perform the residue. There are, therefore, at least two valid reasons why the supposed breaches of the compact give no right to any State to secede. It is clear the parties could not be placed *in statu quo*; and certainly the

seceding States, instead of placing the United States as far as they might in that position, did, when they broke the compact on their part, not only retain all the benefits they had received, but, by the seizure of forts, arsenals, mint, navy-yard, and the other common property, they endeavored to appropriate to their own use all the property which, in consequence of the compact, the United States had placed within their limits, but to which they had no title whatever. There is no principle of law by which one party to a contract is entitled to grab all the property which the contract has been the means of placing within his reach, and at the same time to say that, on account of some partial failure of performance on the other side, he rescinds the contract, and withdraws from its obligations.

There is still another reason why, on the compact theory, there has never been any right of secession. That theory, as we have seen, is, that the Constitution is a compact to which "each State acceded as a State, and is an integral party, its co-States forming as to itself the other party." The Kentucky Resolutions distinctly so state it. Now South Carolina herself will not for a moment allege that all the co-States have broken the compact. She makes no such accusation against her dear sisters Georgia, Florida, and Alabama. *She* does not even aver that Mississippi broke the compact when she attempted to impair the obligation of her own bonds, in contravention of an express provision of the Constitution prohibiting such a procedure. She alleges that Congress has heretofore passed unconstitutional tariff laws, and that Massachusetts and Wisconsin and some other States have passed laws in contravention of the clause of the compact in relation to fugitive slaves, which are void. But if the compact is by each State, as one party, with all the co-States as the other party, neither Congress, nor Massachusetts, nor Wisconsin, nor any dozen of the other States constitutes the other party to the compact; and although they may have severally done those things which they ought not to have done, and left undone those things which they sev-

erally ought to have done, the compact is not broken. "The other party" did not agree that they should do no unlawful acts. On this theory, then, what right has South Carolina, by a disruption of the Union, to injure New Jersey and Delaware, Indiana and Missouri, California and Oregon, against whom she charges no grievance, because she does not approve of the acts of Maine, Michigan, and Massachusetts? The former States cannot control the acts of the latter, nor those of Congress, and are not responsible for them. And so "the other party" with whom South Carolina made her contract has not been guilty of the alleged breach of contract, and has the right to hold her to her bargain. This is a legitimate conclusion from the construction of the compact, as set forth by the learned doctors who study constitutional law with the Kentucky Resolutions for their text-book, and who attempt to justify their acts of insurrection and treason, in levying war upon the United States, on the ground that their States (through their instrumentality it might be added) have previously passed acts of secession. The statement serves to show that the theory of secession sits in judgment upon itself, and is its own executioner.

There is no reasonable escape from these results, if the ordinary rules which govern the obligation of contracts are applicable to the case.

It seems to be supposed, however, that there are different principles or rules in relation to compacts between States from those which govern contracts between persons, because there is no tribunal to determine controversies between the former; and that for this reason each State is the sole judge of its wrongs, and of the mode and means of redress. The Kentucky and Virginia Resolutions of 1798 are relied upon by Mr. Jefferson Davis to sustain this proposition. Those resolutions, it is well understood, had their origin in the alien and sedition laws passed by Congress in 1798. They relate entirely to unconstitutional acts of Congress, and not to those of States or individuals; and no small part of their object was to assert and main-

tain a strict construction of the Constitution, and to deny the authority of the judicial and other departments of the United States to determine conclusively the extent of their powers under it. They endeavor to maintain, in general terms, a right in the States to judge and determine respecting the extent of the powers of the general government under the Constitution, and they declare the acts mentioned unconstitutional. But it is quite clear that those who adopted them did not suppose that these resolutions had any effect to nullify those laws within the respective States adopting the resolutions. They called for the co-operation of the other States; but it is by no means certain that it was supposed that similar declarations of unconstitutionality, even by all the States, would have any effect, except as they might operate upon Congress to induce a repeal of the obnoxious laws, or perhaps upon the judges, whenever the courts should be required to pronounce a decision. The closing part of the last of the Kentucky Resolutions shows clearly that it was not supposed that the declarations of that State had had any effect to arrest the operation of the acts. It is in these words:—

“That this Commonwealth does, therefore, call on its co-States for an expression of their sentiments on the acts concerning aliens, and for the punishment of certain crimes hereinbefore specified, plainly declaring whether those acts are or are not authorized by the Federal compact. And it doubts not that their sense will be so announced, as to prove their attachment unaltered to limited government, whether general or particular, and that the rights and liberties of their co-States will be exposed to no dangers by remaining embarked on a common bottom with their own: That they will concur with this Commonwealth in considering the said acts as so palpably against the Constitution, as to amount to an undisguised declaration that the compact is not meant to be the measure of the powers of the general government, but that it will proceed in the exercise over these States of all powers whatsoever: That they will view this as seizing the rights of the States, and consolidating them in the hands of the general government with a power assumed to bind the States, not merely in cases made federal,

but in all cases whatsoever, by laws made, not with their consent, but by others against their consent: That this would be to surrender the form of government we have chosen, and to live under one deriving its powers from its own will, and not from our authority; and that the co-States, recurring to their natural right in cases not made federal, will concur in declaring these acts void and of no force, and will each unite with this Commonwealth in requesting their repeal at the next session of Congress."

The seventh of the Virginia Resolutions, which calls for a similar co-operation, is as follows:—

"That the good people of this Commonwealth having ever felt, and continuing to feel, the most sincere affection to their brethren of the other States, the truest anxiety for establishing and perpetuating the union of all, and the most scrupulous fidelity to that Constitution which is the pledge of mutual friendship, and the instrument of mutual happiness, the General Assembly doth solemnly appeal to the like dispositions of the other States, in confidence that they will concur with this Commonwealth in declaring, as it does hereby declare, that the acts aforesaid are unconstitutional, and that the necessary and proper measure will be taken by each for co-operating with this State in maintaining unimpaired the authorities, rights, and liberties reserved to the States respectively, or to the people."

The resolutions were transmitted to the other States, and by several of them the principles asserted were as emphatically denied. As they are usually referred to by the advocates of secession as an authority sustaining their positions, we copy also the general declarations which are relied on for that purpose, being the first of the Kentucky and the third of the Virginia Resolutions. The following is the first of the Resolutions of Kentucky, passed Nov. 10, 1798:—

"*Resolved*, That the several States composing the United States of America are not united on the principle of unlimited submission to their general government, but that by compact, under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a general government for special purposes, delegated



to that government certain definite powers, reserving, each State to itself, the residuary mass of right to their own self-government; and that whensoever the general government assumes undelegated powers, its acts are unauthorized, void, and of no force: That to this compact each State acceded as a State, and is an integral party, its co-States forming as to itself the other party: That the government created by this compact was not made the exclusive or final *judge* of the extent of the powers delegated to itself, since that would have made its discretion, and not the Constitution, the measure of its powers; but that, as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress."

We now quote the third of the Virginia Resolutions, passed in the House of Delegates, December 21, 1798, yeas 100, *nays* 63, and subsequently in the Senate, 14 to 3: —

"That this Assembly doth explicitly and peremptorily declare that it views the powers of the Federal Government as resulting from the compact to which the States are parties, as limited by the plain sense and intention of the instrument constituting that compact, as no further valid than they are authorized by the grants enumerated in that compact; and that in case of a deliberate, palpable, and dangerous exercise of other powers not granted by the said compact, the States, who are parties thereto, have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits the authorities, rights, and liberties appertaining to them."

The first remark which occurs in relation to both of these resolutions, in their connection with this subject, is, that they do not suggest that the election of a President from one section rather than another, or of one who entertains opinions in which certain sections do not concur; or any anticipation of measures which may or may not be adopted; or that any act of a State, especially any such act which may come under the cognizance of the judicial tribunals and be declared void, — furnishes a case in which a State may "inter-

pose for arresting the progress of the evil." In the next place, they assert no right of secession as a State remedy for the exercise by Congress of powers not granted by the compact, nor for any other grievance. If they intend to insist on a right of revolution as a measure of redress, they may be in accordance with received principles. If they mean anything else, the specification of it is not apparent. Mr. Madison, who must have known something of their meaning, denied that they sanctioned nullification, and they give as little support to secession. But, further, if they had contained an explicit declaration of a right of secession, this would prove nothing. The resolutions and platforms of political parties, in times of party excitement, whether in or out of the halls of legislation, do not furnish any authentic expositions of the principles of constitutional law.

While there is nothing in the Constitution, even supposing it to be a compact, which can sustain the position that each State may judge respecting infractions of it, and may withdraw from its obligations when she pleases to consider herself aggrieved, there seems to be nothing in the principles of public law to give countenance to such a right. Compacts between States are, in principle, as binding as those between persons. There is no court to interpret and enforce them, and each party may therefore insist upon its own construction. If they do not agree, however, the result is not that the compact falls, and its obligations cease, nor that either party may declare it no longer in force, or secede from it on an allegation of infraction by the other, that other being bound to submit to this judgment and determination; but each party has the right to insist on the performance of the agreement, and the mode of enforcing or of obtaining satisfaction for any breach of it is War. We are not aware that a right of peaceable *withdrawal* from a treaty is recognized anywhere, unless the terms of the treaty, or the circumstances, show such to have been the intention of the parties to it; or unless an

infraction of it justifying such a course is admitted. One party has the power of interpreting for itself, and may perform or not perform. But the other party has just the same right of interpretation, and may insist upon a strict fulfilment of the stipulations, and punish non-performance in the only mode which the nature of the case admits. The right to punish non-performance shows that there is no right to refuse further compliance. For these reasons, among others, some treaties contain a clause providing that the treaty, or perhaps certain provisions of it, may be terminated on notice for that purpose.

If, then, the Constitution were a compact to which each of the States is a party, being the sole judge of its wrongs and of the modes of redress, so that one State, judging that it was injured, should determine to secede as a measure of redress ; each and every of the other States would have an equal right to judge and determine that the seceding State was not injured by the alleged grievance, but that they were severally and jointly aggrieved by the attempted secession and refusal further to comply with the obligations of the compact, and that the proper mode and means of redress for that injury was war, jointly and severally waged against the seceding party. This seems, practically, to be the state of things at the present time. Some of the parties determine that they will attempt to secede. They repeal their ratifications (which, by the way, are not subject to repeal) ; appropriate to their own use so much of the common property as is within their borders ; fire upon an unarmed vessel carrying supplies to one of the forts belonging to the general government ; reduce the fort by a bombardment sustained by seven thousand men, more or less, against some seventy in the occupation of it ;— and then they say, “ All we want is to be let alone.” At the same time they are investing another fort, and threatening destruction to it and its defenders if it is not surrendered.

The other parties to the compact determine that they are

aggrieved by these proceedings, and will resist the attempt; and they also resort to gunpowder, shot, and shells, on their part, as stringent legal and equitable powers, whereby to regain possession, and to compel restitution and specific performance of the compact. President Lincoln thereupon issues his proclamation, calling for militia to execute the laws and suppress the insurrection; and this, according to the Message before us, constitutes a declaration of war.

Furthermore, viewed as a compact or treaty between States, it is what is termed a "*transitory convention*," and cannot be revoked, rescinded, or annulled, repudiated or seceded from, by any State, on account of its nature.

"General compacts between nations," says Mr. Wheaton, "may be divided into what are called *transitory conventions*, and *treaties* properly so termed. The first are perpetual in their nature, so that, being once carried into effect, they subsist independent of any change in the sovereignty and form of government of the contracting parties; and although their operation may, in some cases, be suspended during war, they revive on the return of peace, without any express stipulation. Such are treaties of cession, boundary, or exchange of territory, or those which create a permanent servitude in favor of one nation within the territory of another." — *Wheaton's Elements of International Law*, 6th ed., p. 332, Sect. 9.

On the theory of compact, the Constitution contains an agreement of each State with the other States, that the government organized under it, for the benefit of all the States, may exercise certain rights within the limits of each State, by an occupation of the soil, for the uses and purposes for which the government is established. It confers, by agreement and grant, a power of *eminent domain*; a right to take lands for forts, arsenals, navy-yards, military roads, and other public uses; a right of occupation within the waters of each State by a naval force when necessary; a right on land and water for the collection of customs; a right of taxation, and of collecting the taxes by sales of lands and goods; a right to have court-

houses, to hold courts, to reverse the judgments of the State courts in certain instances, and to execute final process against persons and property. These grants of rights to occupy, take, possess, use, tax, try, judge, reverse, and do final execution within the limits of every State, show a permanent servitude of a most extensive character; the United States, representing all the States, being the *dominant*, and each State a *servient* party. From their very nature these rights and powers cannot be resumed or revoked at the pleasure of any State, or of any number of States less than the whole. And it may be added that they impair, somewhat effectually, the supposed absolute sovereignty of the separate States. Civil war may suspend the exercise of these rights and powers, but it does not annul or take them away.

It has been urged by the advocates of secession, that the tenth amendment of the Constitution, which provides "that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," sustains their positions. If it were shown that the States had a right of seceding from the Union before there was any Union to secede from, there would be some foundation for this suggestion, as it is quite clear that no right of secession was granted to the United States; and the conclusion would follow, that it was among the rights reserved. But the supposition of an existing right to rescind a particular contract before the contract is entered into, of the existence of a right to secede from a Union which is not formed and may not exist, and then a reservation of this right of secession by a general declaration, after the Union was formed, that powers not granted were reserved, is simply an absurdity. There could be no right of secession until there was something to secede from. Such a right could come into existence only upon or after the creation of the Union which was to be broken up by the exercise of it; and it is preposterous, therefore, to say it was a right reserved to the States by

the general reservation of all powers not granted or prohibited, which referred only to rights or powers pre-existing.

But this argument may be disposed of in another manner. A similar reservation, but in much stronger terms, was contained in the second clause of the Articles of Confederation, in these words: "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States in Congress assembled." The change in the phraseology of the reservation, or declaration, may be worthy of note. Now if this earlier, and in terms much more ample reservation, found in those Articles, did not include a right of secession from the Confederation, upon alleged grave violation of the powers conferred upon Congress by that instrument, still less can the tenth amendment of the Constitution sustain any such right to judge of infractions of the Constitution, and to withdraw by virtue of the powers reserved. And this leads us to a concluding and conclusive argument to show the perpetuity of the Union as established by the Constitution, and according to the Constitution, even if that instrument is supposed to have the character of a compact.

We have thus far endeavored to show that there was no right of secession from the Union established by the Articles of Confederation, and that there is no such right under the Constitution, upon general principles applicable to such instruments, whether regarded as compacts or as organic laws. We now proceed to make assurance doubly sure upon this point, by specific citations from the express language of the Articles, and of the Constitution itself, and from official documents connected with their adoption, which admit of no misapprehension.

The Articles of Confederation expressly, explicitly, and in the most emphatic manner, established a "Perpetual Union" between the States. As prepared and submitted to the States for ratification, they were entitled "Articles of Confederation

and Perpetual Union." And the closing part of the last of the Articles is : —

"And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual ; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State."

The Articles having been agreed upon in Congress on the 15th of November, 1777, on the 17th of the same month that body transmitted copies to the several States, for the consideration of their respective legislatures, accompanied by circular letters, in which it was represented that, "to form a permanent union accommodated to the opinion and wishes of so many States, differing in habits, produce, commerce, and internal police, was found to be a work which nothing but time and reflection, conspiring with a disposition to conciliate, could mature and accomplish." In recommending them to the immediate and dispassionate attention of the legislatures of the several States, it was said : —

"Let them be candidly reviewed, under a sense of the difficulty of combining in one general system the various sentiments and interests of a continent divided into so many sovereign and independent communities, — under a conviction of the absolute necessity of uniting all our councils, and all our strength, to maintain and defend our common liberties ; let them be examined with a liberality becoming brethren and fellow-citizens surrounded by the same imminent dangers, contending for the same illustrious prize, and deeply interested in being forever bound and connected together by ties the most intimate and indissoluble."

Still further : — The closing recommendation, of set purpose, it would seem, to show again that the union was to be perpetual, repeats the title : —

"And to each respective Legislature it is recommended to invest its delegates with competent powers, ultimately, in the name and behalf of

the State, to subscribe Articles of Confederation and Perpetual Union of the United States."

A preamble was affixed to the Articles, reciting that the delegates in Congress assembled did on the 15th of November, 1777, "agree to certain Articles of Confederation and Perpetual Union between the States," which are then set forth at large; and they are followed by the formal instrument of ratification, subscribed by the delegates authorized for that purpose, in these words:—

"And whereas it hath pleased the great Governor of the world to incline the hearts of the legislatures we respectively represent in Congress, to approve of and to authorize us to ratify the said Articles of Confederation and Perpetual Union: *Know ye*, That we, the undersigned delegates, by virtue of the power and authority to us given for that purpose, do, by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said Articles of Confederation and Perpetual Union, and all and singular the matters and things therein contained; and we do farther solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States, in Congress assembled, on all questions which by the said Confederation are submitted to them; and that the articles thereof shall be inviolably observed by the States we respectively represent, and that the Union shall be perpetual."

It seems impossible to read the foregoing extracts without a conviction that there was an industrious repetition of the idea that the Union under the Articles was to be perpetual, so that no doubt should ever after be entertained respecting it; and certainly no agreement to that effect could be more explicit than that contained in the closing parts of the Articles and of the ratification.

The Articles of Confederation which established this "perpetual," "permanent," "indissoluble" Union, proved to be inadequate to the purpose for which they were adopted, and proceedings were had, from time to time, in Congress, with



a view to amendments. The history of the change by which a Union under the Constitution was substituted for that under the Articles of Confederation, need not be set forth at this time. The great defect appeared to be a lack of power in Congress to regulate commerce. But at a meeting of commissioners from five States, held at Annapolis, in September, 1786, a report was made to their respective States, and copies transmitted to Congress, in which they represented the necessity of a convention, with a full attendance and enlarged powers; and recommended the appointment of commissioners "to take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the Constitution of the federal government adequate to the exigencies of the Union; and to report such an act for that purpose to the United States in Congress assembled, as, when agreed to by them, and afterwards confirmed by the legislatures of every State, will effectually provide for the same." A convention was assembled, and finally reported the Constitution, providing for regular legislative, executive, and judicial departments, with enlarged, but limited, powers, appropriate to such departments, and of a national character; by reason of which it became necessary to submit it to the people for ratification. It was ratified, and thus the government organized under it was substituted for the administration existing under the Articles of Confederation. The reasons for its adoption, summarily set forth in the preamble of the instrument itself, are "*to form a more perfect Union, establish justice, insure domestic tranquillity, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.*"

Now it appears to be preposterous to contend that this more perfect Union, established for posterity as well as for the existing generation, and thus substituted for the perpetual, indissoluble Union under the Articles, is one which was to exist only at the pleasure of each and every State, and to

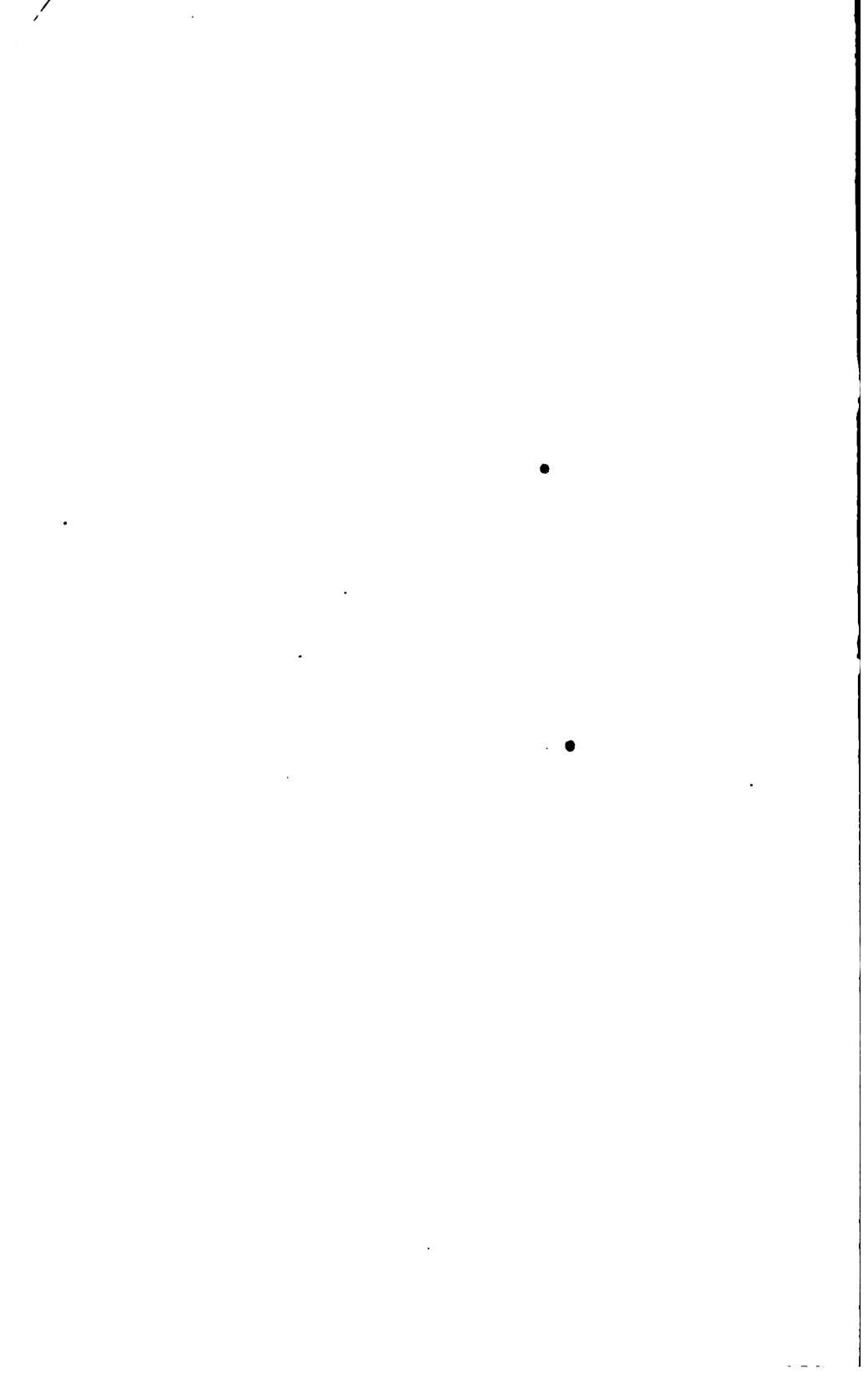
be dissolved when any State shall assert that it is aggrieved, and repeal the act of ratification. The Union could not be made "more perfect" in relation to its endurance. It certainly was not intended to be made less perfect in that particular.

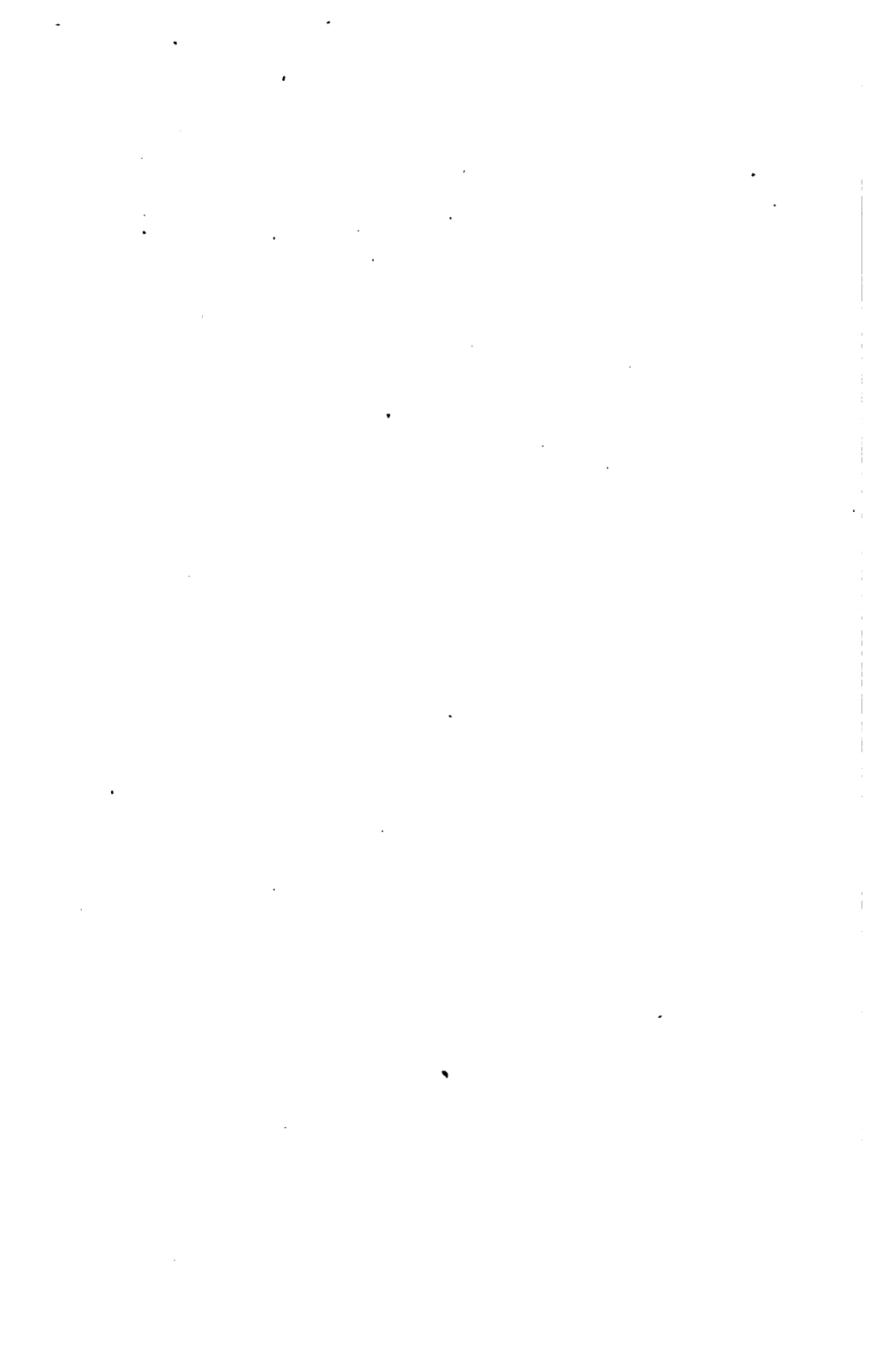
These considerations show further, that the political axiom, that "all rightful government is founded upon the consent of the governed," cannot justify or excuse secession. It might be urged that the principle asserted is not that government is founded upon the consent of all the persons to be governed, but we pass that. The consent has been given by the ratification of the Constitution. The compact has been made by the Fathers, who vindicated their title to the country, and their right to form the institutions under which it should be governed. The present generation comes in as their successors, and is thus "in privity." The covenant "runs with the land," and binds all persons who occupy it. If any one desires to relieve himself from the obligations which it imposes, he can secede, personally, by transferring his domicile to some other country.

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NOTE TO PAGE 26. — The first of the Kentucky Resolutions, as printed in the fourth volume of Elliot's *Debates, &c.*, page 540, does not contain the words "its co-States forming as to itself the other party." The omission is doubtless a mere misprint. They are found in the copy of the Resolutions forwarded by Kentucky to the Legislature of Massachusetts immediately after their adoption; in the Resolution as published in 2d Randall's *Life of Jefferson*, 449; 3d Randall's *Life*, 616; and in the original draft, printed in 9th *Jefferson's Writings*, 464.

The fourth volume of Elliot, apparently of an edition of 1859, is merely the edition of 1836 with the names of new publishers.







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PERSONAL LIBERTY LAWS,

(Statutes of Massachusetts.)

AND

SLAVERY IN THE TERRITORIES,

(Case of Dred Scott.)

BY JOEL PARKER.

BOSTON:

WRIGHT & POTTER, PRINTERS, 4 SPRING LANE.

1861.

MEMORANDUM.—The following Letters were originally prepared for publication in the "Boston Journal."

The first part of the earliest letter was written, as it will be seen, in justification of the writer's course, in relation to the "Personal Liberty Laws," while acting as Chairman of the Commissioners on the Revision of the Statutes of Massachusetts; to which he thought it expedient to subjoin, very briefly, the expression of his personal opinions respecting those provisions of the statutes, with some other opinions serving to show that his was not a partisan opposition to them.

At that time he had not even the most remote intention of pursuing the discussion any farther. But the subsequent appearance of divers papers and paragraphs, in which other opinions were expressed, induced him to enter upon the discussion more in detail, in a series of papers which are now collected for the greater convenience of those who may desire to refer to them, or perchance for the inspection of some who had no opportunity to see them in the original publication.

If they may lead to more just views respecting the subjects discussed, the object of the writer will be attained.

J. P.

CAMBRIDGE, February 23, 1861.

## PERSONAL LIBERTY LAWS.

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### Explanatory and Introductory.

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*To the Editor of the Boston Journal:—*

The “Atlas and Bee” of the 21st inst., in its leading article respecting “The Address to the Citizens of Massachusetts,” lately published, has this paragraph:—

“The name of Judge Parker on this list is very suggestive. How does it happen, it will be asked, that so distinguished a jurist, selected for his ability to revise the statutes of the State, should have permitted laws to remain on the statute book of Massachusetts which are in conflict with the constitution and laws of the United States? Of what use is it to subject the State to so large an expense in codifying the laws if such unconstitutional laws are to be allowed to continue in force, and that without either remonstrance or suggestion by the Commissioners? If it be said that the Commissioners themselves had not the power to change their character, had they believed them unconstitutional, they certainly would have recommended a change to the legislative committee, before whom they appeared for suggestions and explanations of their labors.”

This is somewhat surprising, coming from that paper, the responsible editors of which must have known and understood that the Resolve of the legislature, under which the Commissioners acted, contained no provision authorizing them to judge respecting the constitutionality of the acts of the legislature, and that it was very clearly not expedient that they should transcend their duty in that particular.



Had they done so, and reported against the provisions of the "Personal Liberty Bill," which had been enacted by one legislature and amended by another, the burst of indignation which would have followed would have waked the echoes of Abington, and Lowell, and Worcester, even if it did not extend to Great Barrington itself.

But in their Introductory Report the Commissioners, after stating that they had sedulously avoided the introduction of their personal opinions respecting matters of expediency, but had considered it their duty to construct the several chapters according to what appeared to be the general policy of the legislature, as they found it expressed, added this clause, viz.: "*They have not deemed it a part of their duty to pass upon doubtful questions of constitutional law, the presumption being that all the statutes of the State are constitutional until the contrary appears.*" As Commissioners, they were not authorized to rebut the presumption, and determine what was or was not unconstitutional; but here is a reasonable indication of an opinion that there were some provisions which were at least of doubtful constitutionality; and if any member of the legislature had made inquiry to what provisions reference was thus made, he would doubtless have received a ready answer. But no one asked, and certainly further suggestion need not have been volunteered. The Commissioners had abundant evidence that there were divers gentlemen in the legislature who deemed themselves quite competent to the work of revision without their assistance.

It may be added that when chapter 144, which contains the provisions in relation to personal liberty was considered by the Committee of Revision, or by its sub committee, "Judge Parker" had no personal or official connection with

either; and when, upon the *compromise* between the two Houses, the report of the Committee of Revision was committed to the Commissioners for a report thereon, the limited submission did not include any consideration of the constitutionality of the matters contained in the statute book. Their duty then was mainly to classify the proposed amendments, and to ascertain how many of the *shall be's* which had been retained in the provisions incorporated from the Revised Statutes, should be struck out, in order to produce uniformity with the Commissioners' Fifth Part.

Moreover, the alteration of the statute in relation to the writ of habeas corpus, hereafter mentioned, so that it would issue to the sheriff requiring him to *take an alleged fugitive slave from the custody of the marshal who held him under process of the United States*, was made by the very legislature which considered the Commissioners' Report, after the Commissioners had closed their examinations; to wit, on the 21st of December, 1859. It was the last Act but one which was incorporated into the revision. So much for the responsibility of the Commissioners.

Perhaps it may not be amiss if I avail myself of this occasion, to state somewhat more in detail, the reasons which induce me to believe that several of the provisions of chapter 144 of the General Statutes are unconstitutional. These reasons were stated a few days since in a letter to a friend who had made inquiry upon the subject, as will appear by the following extract:—

“This subject came under my consideration while revising the statutes, although it was quite apparent that it was not the *duty* of the Commissioners, and as apparent that it was not *expedient* for them, to report their opinion against the constitutionality of provisions now found in chapter 144 of the General Statutes. My belief,

from examination at that time, and from subsequent consideration, is that there are constitutional objections to several sections of that chapter.

"Section 6 requires a judge of the State court to issue a writ of habeas corpus, commanding the sheriff to take into his custody any person restrained of his liberty, &c., unless he is held by certain officers of this State. Of course he is to take an alleged fugitive out of the custody of the United States marshal, who holds him under the process of the United States, and thereby to impede, and thus far to nullify, the laws of the United States. If the marshal resists the service, he is liable, under section 38, to be attached as for a contempt.

"Section 19 requires the judge, when a return is made showing that the party is claimed to be held to service or labor in another State, on the application of any party to the proceeding, to order a trial by jury, as to any facts stated in the return of the officer, or alleged; and to admit the person held in custody to bail; although the United States process requires the marshal to hold him, and to dispose of him in accordance with the laws of the United States. This section also discharges him, on the verdict of the jury, [in his favor,] from any return to the custody of the marshal. In this mode it takes the trial of all questions which may arise out of the jurisdiction of the United States.

"Section 21 changes the ordinary rules of evidence which would otherwise be applicable to such trial by jury, supposing that to be admissible, excluding the declarations, even the voluntary declarations, of the alleged fugitive, placing the burden of proof of every question of fact upon the claimant, requiring two witnesses, and excluding the very evidence which the Act of Congress allows as sufficient on the hearing before a United States officer, to show that the person owed labor or service.

"Section 58 provides for the appointment of commissioners to secure this extraordinary trial by jury.

"Section 62 punishes any person who assists in removing, or comes into the State with the intention of removing, or assisting in removing, any person who is not held to service, &c., on pretence that he is so held, or has escaped, &c. Unless the term 'pretence' is construed to mean fraudulent pretence, which is not a necessary construction, this section compels every one who aids, or comes with the intention of aiding, in the removal of a supposed fugitive, to judge, at the peril of the extreme punishment imposed by this section,

whether the party claimed is held, or has escaped. Its manifest tendency, and its undoubted intention, apparent on its face, is to deter any person from aiding in attempts to reclaim fugitives, and thus to hinder the execution of the fugitive slave law.

"Section 63 subjects any officer of the State, or member of the volunteer militia, who aids in arresting a person claimed, *or in returning one adjudged to be a fugitive*, to a severe punishment, and thus debars citizens of the United States from aiding in the execution of the laws of that government. The exemption from the penalties of this section of members of the volunteer militia who act in obedience to orders, does not obviate this objection.

"I do not perceive how the constitutionality of either of these sections is to be maintained so far as they apply to cases where there are legal proceedings for the reclamation of a fugitive slave, and it seems to be clear that some of them are not constitutional when applied to cases where the master attempts to reclaim his slave without process."

Farther consideration of the subject, since the letter above mentioned was written, has only served to confirm the opinions thus expressed; and I may add here, that it will not be an answer to say, that some of these provisions may have a constitutional application to other cases than those where a party claimed as a fugitive slave is in the custody of an officer of the United States, under process which commands the officer to hold him, and that they are not therefore wholly unconstitutional, because they may perhaps have a constitutional application to some case. Suppose, for instance, that a person under an alleged contract for labor and service to be rendered to him for the term of one year, imprisoned and detained the other party to the contract, in order to compel him to perform the service according to the contract, and that a habeas corpus was issued under the sixth section. It is not doubted that there would be nothing unconstitutional in taking such person out of the custody of

the party holding him, by means of the writ of habeas corpus, and bringing him before a judge, admitting him to bail, and trying the question of fact, if there was any one to be tried, by a jury. But no such case is on record, or likely to exist. Suppose, also, that the writ of habeas corpus might be used to take an alleged fugitive slave from the custody of a party claiming to be his master, who had pursued and captured him without process—which is by no means clear. But if that were admitted, the provisions which have been cited above were not enacted for such cases alone, nor mainly for that class. Prior to 1859, if the party alleged to be unlawfully detained was imprisoned or restrained by a marshal, deputy-marshal, or other like officer of the courts of the United States, the writ of habeas corpus was not to be issued commanding the sheriff to take the party into his custody, but the marshal, or other like officer, having the custody, was required to bring him before the judge of the State court, in order to an inquiry whether he was held lawfully. The alteration in 1859, by which in all cases, except where the party was in the custody of an officer of this State, the writ was to be issued requiring the sheriff to take him into custody, was a change, covering, and designed to cover and apply to, the very case of an alleged fugitive slave in the custody of the marshal, so as to take him out of that custody, and then admit him to bail, and to try all questions by a jury, under the State laws. The contemporaneous history will, I think, show clearly that the object of Massachusetts in 1855, was to hinder as far as possible the return of fugitive slaves. The excuse must be found in the great provocation, arising from the imprisonment of her colored seamen at the South, in the expulsion of the agents whom she sent to protect them, and in other

grievances and wrongs done to her citizens. If this excuse is not sufficient, it will not be to her honor to attempt to crawl off now, on an allegation that there are some cases to which some of the provisions of the personal liberty bill may be applied consistently with the Constitution and laws of the United States, and that those provisions must be taken to mean such cases. Even this cannot be said of all. Let us meet this question fairly, and dispose of it conscientiously, under our constitutional obligations.

And now, having said thus much, I am desirous of saying a few words more, notwithstanding a full comprehension that they are the words of one of those whom the "Springfield Republican" speaks of as, "those old Bourbons of Massachusetts," who "can scarcely govern more votes than the coats on their backs will cover;" and it may be added, of one who will be greatly satisfied if he can always cast the single vote which his coat covers so that it may subserve the best interests of the country. The words may furnish material for the consideration of others, which is the purpose for which they are offered. They seem to be appropriate accompaniments to the expression of these opinions respecting the personal liberty bill, and may be taken in connection with them.

It seems to me that all projects, at this time, for a convention to change the Constitution, or for constitutional amendments through the action of Congress, are not only unwise, but mischievous; because they have a tendency to excite hopes which cannot be realized. I am persuaded that an expectation of any amendment of the Constitution is vain and futile; and unsuccessful efforts to procure amendments will only excite greater animosity. The Constitution is well enough, if all parties perform their duties under it.

Any attempt in Congress to agree upon a new compromise line, if it might, by possibility, be successful, is only leaving the matter open to a speedy renewal of the controversies which have agitated the country since 1854, and is therefore to be avoided. What can be settled, had better be settled now; but we have had sufficient experience that a Congressional compromise line settles nothing. Congress can destroy it again, even if the supreme court cannot. The doctrine which has been promulgated by some of the incumbents of that bench, that the Constitution secures a right to carry slaves into the territories, and protects slavery there, is utterly indefensible. The question whether slavery shall be allowed or prohibited in the territories is a political question, except so far as it may be settled at the present time by some law which is within the control of Congress. And if the judges of the supreme court assume to control its introduction, under the pretence that the Constitution takes the matter out of the control of Congress, it will be mere usurpation.

There is one compromise which is practicable, and in my opinion but one. The Northern States may be induced to repeal all the provisions of their personal liberty bills which conflict with the Constitution of the United States, or with constitutional acts of Congress for the rendition of fugitive slaves, and they may permit such acts of Congress to be fairly executed, under the authority of the United States, without unlawful hindrance by their citizens. These things they ought to do under their constitutional obligations. This for one side of the compromise.

An act of Congress, having more regard to the possible rights of persons claimed as fugitives, and less offensive to the opinions and feelings of the communities where the law

is to be enforced, may be enacted ; and the question of the admission of slavery into the territories may be left to the action of Congress, which alone has, or with the present constitution can have, any rightful control over that subject. If Congress prohibits slavery in a territory, the people who inhabit it have no constitutional right to legalize it there ; for except by the authority of Congress, they have, while in a territorial existence, no right of legislation. If Congress admits slavery, and it is introduced under the protection of the law of Congress, no legislature, or judicial tribunal, can prohibit it. If Congress pleases to leave the matter to be settled by the inhabitants of the territory, no power is authorized to gainsay their conclusion. This may be the other side of the compromise at present. But after a few weeks more of violence and expulsion of the citizens of Northern States from States where the Constitution secures, or should secure, to them their rights as citizens of other States, this side of the compromise may require some additional guaranty, if any can be given, for the personal safety of citizens of the free States, who may peaceably, and without any violation of law, have occasion to visit some of the Southern States. Certainly if amendments of the Constitution were to be made, this subject could not be overlooked. There can be no question, that ultraism and violence at the South in and out of the halls of legislation, have done more to cause the feeling at the North, of which complaint is made, than all the arguments of the abolitionists. An appeal to the Northern States to perform their constitutional duties will not be in vain, when the Southern States abide by their constitutional obligations.

Furthermore, Congress has no power to interfere with slavery in the States. No man of ordinary common sense



asserts any such power. No guaranty is necessary respecting that.

Congress cannot prohibit the transportation of slaves from one State to another State, and so there is no occasion for constitutional amendments in relation to that subject. If the master takes his slaves into a free State, they may thereby become free under the laws of the State into which they are introduced, as they would be if sent to England. He must look to that.

If it may be supposed that regulations affecting a traffic in slaves, between the slave States, may be made under the constitutional power of Congress to regulate commerce between the States, it is not readily seen how that power can lawfully be exercised so as to do any essential mischief to the interests of the slave States, so long as they remain in the Union. The power must be exercised in relation to this subject, upon similar principles to those which will govern its exercise respecting other matters which form the subjects of commerce between the States. There is little or no legislation under this power at present, nor is there likely to be.

As to slavery in the District of Columbia, there will always be northern members of Congress enough who, like Mr. Lincoln, will refuse to abolish it, so long as Maryland and Virginia remain in the Union, and choose to continue slave States.

If a settlement of the existing questions now pending cannot be effected on the basis above indicated, those who love the Union, and desire its continuance, may as well accept the alternative, whatever that shall prove to be, at this time, as at any other.

Cambridge, December 25, 1860.

**Personal Liberty Laws....No. 1.**

The opinions which I expressed in my letter, published December 28, relative to the unconstitutionality of several sections of chapter 144 of the General Statutes, if those sections are to be understood and interpreted according to the obvious and ordinary meaning of the words in which they are expressed, and if they were intended to be applied to, and cover, the cases which come within the scope of their provisions, according to the language of the enactment, have not, so far as I am aware, been denied by any one. The language is certainly broad enough to include all cases of alleged fugitives from service or labor, as well as those where the supposed fugitive is in the custody of the marshal or some other United States officer, in virtue of process, under the provisions of the fugitive slave law, as those where he is arrested and held without process, by a private person. There is no exception of the former cases; and those are the cases which have occurred, and which led to the passage of the personal liberty laws. Cases of that character may be said to be the only cases which can be expected to occur hereafter; for it is not probable that any master will attempt the recovery of a fugitive slave here without legal process, or what he supposes to be legal process, for the purpose; and so far as mere kidnappers are concerned, the statutes as they existed prior to 1855 were supposed to be sufficient.

The obvious conclusion, then, would seem to be that these provisions are intended to operate precisely in accordance

with the terms in which the legislature has seen fit to clothe them, and which bring them into direct conflict with the Constitution and laws of the United States.

But notwithstanding the very broad terms in which they are expressed, it seems to be supposed that the constitutionality of these sections may be maintained upon the ground that, in and of themselves, they are well enough ; that there is in the statute no conflict with the provision of the Constitution respecting the return of fugitive slaves, nor any conflict with any portion of the fugitive slave law ; that the command in the writ of habeas corpus by which the sheriff is to take the custody of a party restrained, and the provision authorizing him to be admitted to bail, and requiring a trial by jury on demand of any person interested, do not apply to a case where an alleged fugitive is in the custody of the marshal of the United States, under process which requires that officer to hold him, because in such case the custody of the marshal being lawful, the sheriff cannot lawfully take the fugitive from that custody ; wherefore the provisions of the State law are not to be construed as applying to such a case ; and so of the other provisions respecting bail and the trial by jury. In other words, that in all cases where the State law cannot lawfully be enforced according to its terms, because of its conflict with the laws of the United States, it does not apply, and therefore it is constitutional. The reason why it cannot be enforced, and therefore does not apply, being, as I think, that it is unconstitutional.

Another view which is taken of the question is, that the fugitive being in the custody of the marshal, it is true that the sheriff cannot take him, and the State judge cannot take bail, or try the case ; but that this results simply from the

fact that the arrest by the marshal is superior, because prior in time; and that although the State law is inoperative in such a case, this shows that there is no conflict, and so there is no unconstitutionality. The argument seems to be in effect, that the personal liberty law is in entire harmony with the constitutional provision, and with the laws of Congress respecting the rendition of fugitive slaves, because the national and State governments have co-ordinate jurisdiction, and where one has obtained the lawful custody of a person, or of property, for the purpose of legal inquiry into the right to hold the person, or into the title to the property, the person or property is thereby withdrawn from the corresponding jurisdiction of the other government until the investigation is completed; that this does not depend upon any supremacy or preference of one government over the other, but upon the naked question which first acquires jurisdiction of the subject matter to be determined; and that this view relieves the State statutes from all constitutional objections.

It is further argued that the section which provides for the punishment of a party who aids in the arrest of a person who is not a fugitive, on the pretence that he is such, applies only to a party who acts with an "unlawful intent," as well as does the unlawful act; and that the prohibitions upon the civil and military servants of the Commonwealth, apply only to acts done by them in their official and military capacities, and do not and were not intended to apply to acts done by them in their private capacity as citizens of the United States.

The argument, as above stated, is certainly ingenious. It evidently emanates from an acute legal mind. On a superficial consideration it may seem to have weight. As-

surely if it has a just application to the provisions in chapter 144, to which exception has been taken, the objection that those provisions of the statute are unconstitutional, must be abandoned ; for it is quite clear that there is a class of cases in which the sheriff or marshal, whichever first serves his process, will have the right to retain, as against the other, the custody of the person or property which he has lawfully seized under his process, although the other has process in his hands on which he could make a seizure but for the custody of the first. And this result is not from any special provision of law for that purpose in the statutes of either government ; but because this priority of custody gives priority of jurisdiction to hold and dispose of the subject matter thus seized, according to the purpose for which it was seized ; and this jurisdiction continues until that custody is lawfully terminated, under the law of the government by which it was taken. Thus, under the general laws of the United States, the marshal may attach property, upon a writ issued by a court of the United States, and, under the laws of the State, the sheriff, on a similar writ issuing from a State court, may attach property of the same defendant ; but where one has, on his writ, seized personal property, the other cannot, by virtue of the writ in his hands, take that property out of the custody of the other. And so it would be in relation to an arrest of the body, if each writ contains a command for such arrest. This result is reached not from any special exception in the laws of either government, or in the command of the writ, but from priority of seizure, with a right to hold, which excludes a second seizure by another, acting in a different right.

Now if the laws of the United States, and the laws of the State on the subject in question, and the different processes

issued under those laws, were designed to effect the same purpose, to wit: the capture and return of the fugitive slave, the argument would have a much better application. Its fallacy, on this point, arises from the fact that there is no analogy whatever between proceedings for the arrest and return of a fugitive slave, and proceedings to set a man free from an unlawful imprisonment.

The duty of the United States, under the clause in the Constitution for the return of fugitives from service and labor, is to enact suitable provisions regulating the mode in which the claim shall be made, the examination had, and the return effected; which duty is single, confined to that subject; and the United States in the execution of that duty restrains personal liberty only for the purpose of a return. Over the exercise of this duty the State has no power. Assuming that all persons acting under the laws of the United States in this behalf proceed according to those laws, the State has no duty to perform respecting the case. The duty of the State which is brought in conflict with this duty of the United States, is to protect persons within the jurisdiction of the State from unlawful restraint; and for this purpose the State tribunals may inquire whether a person restrained of his liberty is rightfully so restrained. This duty is general in its character, having no particular reference to one kind of unlawful restraint more than another. In relation to fugitives, or alleged fugitives, from service, this duty of the State is not one of prevention from arrest. It cannot lawfully be exercised to prevent a fugitive from being arrested under the laws of the United States, or in anticipation or obstruction of the service of the process of the United States. It can never be performed, therefore, until the party is actually restrained of his liberty,

under a claim that he shall be returned. Even then, the duty is not to determine whether he is or is not a fugitive slave, but to inquire into the restraint, and ascertain whether it is lawful. If the restraint is found to be lawful under the claim, there is an end of the State jurisdiction over the case, whether the party claimed is or is not a fugitive. The State authorities cannot commence proceedings to enforce a return, under the laws of the United States, nor can they try the questions which arise in the proceedings under the fugitive slave law, except those questions which relate to their regularity.

It is quite apparent, therefore, that there is no co-ordinate jurisdiction. The question whether a party claimed as a fugitive is such, and therefore to be returned, is one of supremacy or preference, inasmuch as it is to be tried under and according to the laws of the United States. There is necessarily a priority of custody, under those laws, for all matters involved in the execution of the fugitive slave law ; and the State tribunals cannot, under any State law, interfere to try a question of freedom or servitude, by a jury or otherwise, for the purpose of returning the fugitive, if found to be such ; which is the very jurisdiction exercised by the courts and officers of the United States. In fewer words, the jurisdiction of the United States is for the return of fugitives ; the jurisdiction of the State courts is for setting free persons unlawfully restrained of their liberty ; and so far from being co-ordinate, these different jurisdictions, in relation to this subject matter, are, so far as they may be, antagonistic ; that of the State being emphatically subordinate, as the latter cannot act upon the subject matter until the former has acted, nor then, if the proceedings of the former are regular.

These positions are stated with reference to the existing legislation, and do not intend to deny the right of a State, if it pleases, to exercise the extraordinary comity of passing laws to aid the master in reclaiming the fugitive, so that the claimant might act under the State law, instead of that of the United States. And they assume that the provision of the Constitution in relation to fugitives from service is to be enforced by the laws of the United States, and that the laws passed for that purpose are constitutional. If the question were open for contestation, it might well admit of argument that this constitutional provision is one to be executed by State authority, but that question is not an open one. Congress acted upon the constitutional provision as one to be enforced and executed under the authority of the United States, in 1793, when most of the framers of the Constitution were still alive, and some of them in Congress.

I am not aware that any objection was then made to this exercise of power, either in or out of Congress; nor was any heard of for many years afterward. The supreme court of the United States, and the supreme courts of this and other States, have sustained this interpretation, and the constitutionality of laws passed under it. If any thing of legal interpretation and construction can ever be regarded as settled, this must be so. There can be no stronger case. Some judges of the supreme court of Wisconsin, a few years since, undertook to controvert it, but a better organization of the bench there has acquiesced in what seems now to be the uniform judicial construction.

In my next letter, I will consider the true intent and meaning of the "personal liberty law" of 1855, as derived not only from its terms, but from some of its antecedents.

Cambridge, January 14, 1861.



### Personal Liberty Laws....No. 2.

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Having shown that the jurisdiction of the State over cases where a fugitive from service is arrested under the acts of Congress, is not co-ordinate with, but subordinate to, the jurisdiction of the courts and officers of the United States, charged with the authority and duty to arrest and deliver the fugitive; I propose, in the next place, to ascertain the meaning and true construction of the sections of the "Personal Liberty Laws," to which objections have been made; not merely by the terms of the provisions themselves, but by the antecedents which led to their adoption; and thereby to show that they mean what they say,—were intended to apply to and cover the cases which fall within the terms in which they are expressed,—and that in such application they are in conflict with the Constitution and laws of the United States.

The importance of the subject at this time, and the difference of opinion upon it, will justify a more extended exposition than I should desire to make under other circumstances.

If we seek the remote causes which led to the passage of the Personal Liberty Bill of 1855, some of them will be found in a general aversion to slavery upon moral principles, and because of the unequal political advantages which, under the Constitution, it gives to the slave States; and in a particular indignation aroused by some of its results, as exemplified in the oppression of colored sea-

men in South Carolina and Louisiana, the shameful expulsion of Messrs. Hoar and Hubbard, who went to those States commissioned as agents of Massachusetts to protect the rights of such seamen by an appeal to the legal tribunals in their behalf, and in various other outrages upon the citizens of this and other free States, within slave States, on account of their opinions respecting the "peculiar institution."

The hostility to slavery, arising from these and other causes, found significant expression outside of the halls of legislation in 1842, and within them in 1843.

The Fugitive Slave Law of 1793 enacted that the claimant, or his agent or attorney, might seize or arrest the fugitive, and take him before any judge of the circuit or district courts of the United States residing or being within the State, or *before any magistrate of a county, city, or town corporate*, where the seizure or arrest was made; and upon proof, &c., it should be the duty of the judge or magistrate to give a certificate, which should be a sufficient warrant for removing the fugitive.

In 1837, Mr. Prigg, as attorney of Mrs. Ashmore of Maryland, having obtained a warrant from a justice of the peace in Pennsylvania, caused Margaret Morgan, a negro woman who was in Maryland a slave for life of Mrs. Ashmore, and who escaped to Pennsylvania in 1832, to be arrested by a constable. She was carried before a magistrate of the State, who refused to take cognizance of the case, and thereupon Prigg carried her and her children to Maryland, and delivered them to Mrs. Ashmore. For this, Prigg and others were indicted in Pennsylvania as kidnappers. The case was tried in 1839, and the jury found a special verdict, setting forth the facts and certain laws of

Pennsylvania bearing upon the case. Judgment was rendered, by agreement of counsel, against the defendants in the State court; and they brought a writ of error to the supreme court of the United States, for the purpose of having an authoritative adjudication upon the questions arising in the case. This is the famous case of *Prigg vs. Pennsylvania*, found in 16 Peters' Reports, 539, and so often referred to in discussions about the return of fugitive slaves. Seven judges delivered opinions; and there is about the usual amount of that diversity of views respecting the different points under consideration, which, for many years past, has caused the opinions of the judges of the supreme court of the United States to have very little weight, except as regards the precise point upon which the case is decided. The general opinion of the court was delivered by Mr. Justice Story. As summed up by Mr. Justice Wayne, it, among other things, recognized the right of the owner to arrest the fugitive without process, and held that no State law is constitutional which interferes with that right; that the legislation of Congress, upon the constitutional provision, as the supreme law of the land, excludes all State legislation upon the same subject; and that no State can pass any law or regulation to superadd to, control, qualify, or impede, a remedy enacted by Congress for the delivery of fugitive slaves, &c.

Toward the close of his opinion, Mr. Justice Wayne said: "Not a point has been decided in the cause now before this court which has not been ruled in the courts of Massachusetts, New York, and Pennsylvania, and in other State courts. Judges have differed as to some of them, but the courts of the States have announced all of them, with the consideration and solemnities of judicial conclusion. In

cases too, in which the decisions were appropriate, because the points were raised by the record."

Three judges were of opinion that the States might legislate in aid of the constitutional provision; but others held the power of Congress to be exclusive.

In the course of his opinion, Mr. Justice Story said: "The slave is not to be discharged from service or labor in consequence of any State law or regulation. Now certainly, without indulging in any nicety of criticism upon words, it may fairly and reasonably be said, that any State law or State regulation which interrupts, limits, delays, or postpones, the rights of the owner to the immediate possession of the slave, and the immediate command of his service and labor, operates, *pro tanto*, as a discharge of the slave therefrom." And speaking of the act of 1793, he remarked: "We hold the act to be clearly constitutional in all its leading provisions, and, indeed, with the exception of that part which confers authority upon State magistrates, to be free from reasonable doubt and difficulty, upon the grounds already stated. As to the authority so conferred upon State magistrates, while a difference of opinion has existed, and may still exist upon the point, in different States, whether State magistrates are bound to act under it; none is entertained by this court, that *State magistrates may, if they choose, exercise that authority, unless prohibited by State legislation.*" The clause which I have italicised has furnished the foundation of some of our State legislation. How far the foundation supports the superstructure we shall have occasion to consider.

The case was decided at the January term, 1842. It appears from the Life and Letters of Mr. Justice Story, that he regarded this decision as "a triumph of freedom."

In October, 1842, George Latimer was arrested in Boston as a fugitive slave, by constable Stratton, at the request of J. B. Gray, his master, a citizen of Virginia. He was brought before Mr. Justice Story in order to procure a certificate for his return, and the case being adjourned, he was placed in the custody of Mr. Coolidge, the keeper of the Suffolk jail, who used the jail for the purpose of detaining him. This use of the jail was objected to, and a writ of personal replevin sued out, but the jailer refused to receive the bond, or to discharge Latimer. A writ of habeas corpus was then procured, but Chief Justice Shaw, finding that the case was properly pending before the Judge of the circuit court, remanded Latimer to the custody of Coolidge, as the agent of Gray. A public meeting was called, "to provide additional safeguards for the protection of those claimed as fugitives from other States, or as slaves." One of the resolutions declared that the clause of the Constitution, "is not morally binding upon the American people, and should be disregarded by all who fear God and love righteousness." A Latimer journal was published, and resistance was urged in strong terms. A sermon was preached in Boston during the pendency of the proceedings, and afterwards published under the title, "The Covenant with Judas," of which the "Law Reporter," for March, 1843, said: "It is supposed to contain the very cream of the doctrine, that an oath to support the Constitution is not binding; and truly it does contain, with much other sophistry, such argument as has yet been devised, *in the pulpit*, to undermine the moral sense of the people, in the obligations of that oath."

It has not been uncommon, within the last few days, to see in the newspapers statements, that some of the leaders of the secessionists have repeatedly taken the oath to support

the Constitution of the United States, which oath they violate by their support of secession. If they should reply, that they trace the doctrine that the oath has no binding force to the teachings of a New England pulpit, what shall we answer?

Along with the new lessons to be learned, and the new adjustments which are perhaps to be made in our social and political system, it is devoutly to be hoped that a small class of New England clergymen will come to the understanding, that they are not serving the Lord when they denounce the constitution, weaken our reverence for law, and encourage resistance to this particular portion of it. The clause in the constitution, and the laws enacted under it, are not grievances which require to be redressed by revolution. We have a very poor opinion of the piety of the Rev. Doctors of Divinity at the south who are preaching secession so vigorously at the present time. Those at the north who preach *nullification*, serve the same master. Let me respectfully suggest to them that the judicial tribunals are much safer and better judges of constitutional and legal rights and obligations than they can possibly be.

The case of Latimer was terminated by the purchase of his freedom. I have adverted to a few, only, of the circumstances attending it, for the purpose of introducing the act of 1843 upon this subject, as the leading legislation of the Commonwealth in opposition to the execution of the law for the rendition of fugitives; the principle of which has since that time been greatly expanded.

Acting upon the implication contained in Mr. Justice Story's opinion, that State magistrates might be prohibited by State legislation from exercising authority under the act of 1793, the legislature in 1843 enacted, that no judge

of any court of record, and no justice of the peace, should take cognizance or grant a certificate, under the act of 1793, to any person who claims any other person as a fugitive slave within the jurisdiction of this Commonwealth; and that no sheriff, deputy-sheriff, coroner, constable, or jailer, or other officer of the Commonwealth, should arrest or detain any person, or aid in the arrest, or detention, or imprisonment, in any jail, &c., of any person, for the reason that he was claimed as a fugitive slave. The punishment was a fine not exceeding \$1,000 and imprisonment not exceeding one year.

In another letter I will show how this opposition was enlarged into the act of 1855.

Cambridge, January 17, 1861.

**Personal Liberty Laws....No. 3.**

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We know that the Fugitive Slave Law of September 18, 1850, as might have been expected, gave a fresh impulse to the anti-slavery feeling in Massachusetts. Believing the law to be constitutional, I have so said and so taught ; but have at the same time declared that it contained provisions which ought not to have been there, and did not embrace one which it ought to have contained, to wit, a provision for a trial by jury in the place from which the alleged fugitive was supposed to have escaped. This would have assimilated it, so far as the difference of the cases admitted, to the provisions regarding fugitives from justice, to which, under the constitutional provision, it bears a strong analogy. Being constitutional, it is the law of the land ; and those interested should be permitted to carry it into execution, by the aid of the authorities of the United States, without unlawful let or hindrance. In the constitutional convention in 1853, a reference having been made to this subject in a debate upon the judiciary, I expressed a hope that the people of Massachusetts would not place themselves in conflict with the authorities of the Union in regard to it. But in respect to personal aid, as a private citizen, I have to say that when the marshal requires me to help him chase a fugitive, he will receive my personal reply, upon my personal responsibility. The law is unnecessarily offensive, and I would not have voted for it, "come what, come might."



In 1851, a committee of the Senate, upon so much of the governor's address as related to slavery, made an elaborate report, accompanied by resolves and a bill "further to protect personal liberty," which contains the germ, pretty well developed, too, of the act afterward passed in 1855. It has been said, that "in approaching the consideration of these laws, we are to view them as enacted solely for the protection of personal freedom from unlawful restraint; and not, as seems by objectors to be taken for granted, as intended to impair or embarrass the exercise of the rights of slave-masters. And they are to be tested as designed for that end, and that only."

But if we find, on examination of their antecedents and accompaniments, that the latter intent is perfectly obvious; and if we perceive, on inspection of the acts themselves, that their language is perfectly consistent with the unlawful intent in which they appear to have had their origin, then they are to be construed according to their obvious meaning, as shown by the language used, and the intent which dictated it. I extract, therefore, a few short paragraphs from the report, to show that the design of the proposed legislation in 1851 was the protection of the fugitive slave, and not of the free citizen of the Commonwealth.

"Your committee cannot resist the conclusion that this law, (the act of 1850,) in its nature and design, is, in general, plainly hostile to the law of God, and to the design of all just human law. We regard the fugitive slave law, therefore, as morally—not legally, but morally—invalid and void; and though binding on the conduct, no more binding on the conscience of any man than a law would be which should command the people to enslave all the tall men or all the short men, and deliver them up on claim,

to be held in bondage forever ; for the committee can see no moral difference between enslaving a white man and a black one, or a fugitive and one always free." \* \* \*

" But the committee regard the fugitive slave law not only as unconstitutional *in general*, and with regard to its design, but *especially*, as compared with the Constitution itself." (And then follow specifications.)

" Considering this law as unjust in its nature, wrong in its principle, hostile to the design of all just human laws, deeming it in the highest degree unconstitutional, in general and in detail, we do not hesitate to declare that we consider it an infamous and wicked statute, a law not fit to be made and not fit to be kept." \* \* \*

" Yet *it is a law of the land* not officially declared unconstitutional. Unconstitutional, as we believe it, inhuman and wicked, as it unquestionably is, *it is still a law*, and forcible resistance to it a legal misdemeanor. Its results are most disastrous." \* \* \*

" The slave-hunter profanes the soil of Massachusetts, seeking whom he may devour. His presence spreads terror among the colored people of our State. He is a hawk among doves—a wolf, a hyena, among lambs." \* \* \*

" We confess we deem it no less a crime against nature and humanity to enslave a fugitive than to steal a free man. To our judgment, the *illegal* kidnapper on the coast of Africa, and the *legal* man-hunter in Boston belong to the same class of felons. They differ, however, *specifically*, and and we think the native species far worse than the foreign felon, whom all Christian governments, and our own among the number, have denounced as a pirate." \* \* \*

" The committee have made careful inquiries as to what remedies for the present evils are in the power of the legis-

lature of Massachusetts, and what means we have for protecting the rights of our citizens against invasion by persons acting under the authority of the fugitive slave law." And they recommend the passage of the resolves and the bill reported by them.

Now two remarks are quite obvious from the report, of which the above are specimens, and from the bill which accompanied it. The first is, that these unmeasurable denunciations of the "man-hunter" are leveled against persons who come here to claim, by process of law, according to the laws of the State from which they come and according to the Constitution and laws of the United States, persons who have fled from their service; and not against persons who under pretence of such claim, or any other pretence, attempt to kidnap free citizens of this State. If we may judge from some of the language used, the committee would seem to have deemed the latter the lesser offence. They think "the *legal* man-hunter" "far worse than the foreign felon." The second is, that it is not within the ingenuity of man to deny, upon any plausible grounds, that the report, resolves, and bill, were all intended to be in direct antagonism to the legislation of Congress.

The bill was defeated in the Senate by a majority of three.

The case of Thomas Sims occurred in April, while the legislature was in session. If I had time and space, an attempt to count the numerous motions, writs, warrants, and other legal proceedings, which were resorted to in order to prevent his rendition, with a statement of the nature and operation of them, might be more amusing and instructive at this day, than the proceedings themselves were at the time when they occurred. Any one curious in such matters can consult the "Law Reporter" for May, 1851. There were

four or five applications for the favorite remedy of habeas corpus. Sims came into the State about a month before his arrest, escaping from Georgia by secreting himself on board a vessel, and escaping from the vessel, in the harbor, to the shore. It was not doubted that he was a fugitive slave; and it may serve to show what the declaimers respecting personal liberty mean when they talk about protecting the free citizens of the State from kidnappers, that this case of Sims was paraded in the Constitutional Convention, as one in which a "*free citizen of Massachusetts*" had been carried into slavery; and that the refusal of the State judges, on the return of the habeas corpus, to free him from the custody of the marshal, was urged as a reason why the tenure of the judicial office should be changed. "Now, sir," said the advocate for protection to the "free citizens," "I would like to have judges elected by the people that they may not be so independent of them, so that if another case upon the writ of habeas corpus, similar to the one to which I have referred, should come up before them, they will be dependent enough to listen favorably to argument, and be able to give equal protection to all, or better reasons for refusing it than were rendered in the case of Sims." The reason that Sims was held on legal process issued under the authority of the United States, and that the State judges could not liberate him without violating their oaths, was not a sufficient reason with this legislator; and there are others like him. If the judges will not discharge the "free citizens," they say, let us compel the courts to grant them a trial by a jury, who may "listen favorably to argument." This was one of the objects of the bill reported in 1851, and reproduced, with variations, in 1855.

A change in the political administration of the State in 1853 and 1854, gave comparative rest to the subject in the legislature. But in 1854 Anthony Burns was claimed as a fugitive from Virginia. Most of us have a general recollection, at least, of what happened at that time, and what happened afterwards, as some of the results, to the commissioner who sat in that case. His offence was, that, acting according to his convictions of his duty, he gave a certificate for the rendition of the peculiar "free citizen," Anthony Burns, and the friends of the peculiar free citizens bestirred themselves with great energy.

At the next session of the legislature petitions were presented from more than eight thousand persons on this subject. How many of them were women, and how many minors, is not very material. As one of the means of determining the uses and purposes of the legislation of 1855, let us read one of these petitions. They were nearly all in the same words, viz :

"The undersigned citizens of ——— respectfully ask you to declare that any person who engages in arresting, holding or returning a fugitive slave—either as United States judge, commissioner, marshal, deputy-marshal, or in any other capacity whatever, *or even as a private citizen*—shall be forever incapable of holding any office of trust, honor or emolument, whether such office be State, county, city or town office, unless relieved from such merited disgrace by pardon."

"And we also ask you to pass a law which shall punish with fine and imprisonment, any State, county, city or town officer, who shall, during his continuance in such office, aid, in any way, in arresting, holding or returning, a fugitive slave—*whether such acts are apparently done in virtue of his*

*office or otherwise.* And also to punish, by fine and imprisonment, any claimant of an alleged slave, or any aider or abettor of such claimant who shall attempt to remove such alleged slave from this State, without his *first having had a jury trial on the question of his slavery or freedom.*"

I have italicised some parts, which serve to show the purposes of the petitioners, or rather of the managing spirits who prepared the petitions for circulation, in relation to certain matters upon which there is now an attempt to put a very different gloss.

The joint standing committee on Federal Relations, to whom these petitions were referred, along with divers other matters connected with the subject, reported a bill, "To protect the Rights and Liberties of the People of the Commonwealth of Massachusetts," which, after being amended, was passed by both houses. The Attorney-General advised Governor Gardner that some of its provisions were unconstitutional. The Governor vetoed it, and then it was enacted by the affirmative vote of two-thirds in each house.

In my next letter, I propose to offer some further suggestions and evidence respecting the true construction of this act, to be followed by an examination of the legislation of 1859 respecting the writ of habeas corpus.

Cambridge, January 22, 1861.

**Personal Liberty Laws....No. 4.**

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I endeavored in my last, by adverting to some of the prominent points, to sketch briefly the development of the State legislation, in its hostility to slavery, from the act of 1843; which merely withheld the aid of the State in the enforcement of the fugitive slave law, by a denial of the services of State officers, who, according to its terms, might act officially under it, and by the denial of the use of State jails; to the act of 1855, which placed the State in direct antagonism to the enforcement of the law by the authorities of the United States.

Any one who will read the act of 1855, in the light of the facts which have been stated, showing its origin, cannot doubt that the danger to be provided for was that of the surrender of fugitive slaves, and not of the kidnapping of those who were really free citizens of the Commonwealth; and that the design of it was, among other things, to force a jury trial, if possible, in all cases of the arrest of fugitives, by the exercise of a "co-ordinate jurisdiction," in conflict with the jurisdiction of the United States, which first had possession of the case, and which alone could rightfully dispose of it on its merits; to subject all persons to severe punishment who should remove, or aid in removing, any person not a fugitive slave, under a claim that he was one, or who should aid in removing a fugitive under a claim of service by a party to whom it was not due, however honestly they might have acted; to prohibit all persons holding any office in the State from rendering any aid in

the removal of a fugitive, not only in their official capacities, but as citizens; and to prevent, as far as possible, the volunteer militia from acting to preserve the peace by the prevention of an attempt at a rescue.

The petitions may serve, among other things, to show that the jury trial, for which the act provides, was not designed merely to try the lawfulness of the detention, in a case where the master had made an arrest without process, but was expressly intended to try, in all cases, the question of his slavery or freedom.

They may serve also as evidence, that the word "*pretence*," in the seventh section of the act, (section 62 of chapter 144 General Statutes,) which in some connections may undoubtedly mean *false pretext*, is in this legislation used to signify "assumption," or "claim," which are legitimate meanings of the word "*pretence*." This is further shown by the fact that the greater portion of the section is taken *verbatim* from the 5th section of the bill reported in 1851; and that in that bill the word "*pretence*" is found in two other sections, where it evidently means, *show, appearance, assumption or claim*.

The argument that in order to subject any person to the penalty of that section, (supposing it to be constitutional,) it must appear that there was an unlawful intent to remove a party *known* not to be a fugitive from service or labor, is not, I think, to be sustained. No other criminal intent seems to be necessary, in order to constitute the offence, than the intent to do the act which is to be punished; that is, the intent to remove or assist in removing as a person "held to service or labor," one whose service or labor was not due "to the party making the claim." If service or labor was due from the person removed, but not due to the



party making the claim, then the person removing or assisting in removing, would thereby subject himself to punishment. It is saying in effect, if you will act in such matters, you shall act at the peril of this extreme punishment, if you make even a mistake.

There are cases where a statute imposes a penalty upon a person who *knowingly* does the thing forbidden. And there are others where there is an implication, that to constitute a crime the act must be done with a guilty knowledge. But it is respectfully submitted that this case is not of that class; and no lawyer would venture to assure a client, indicted under this section, that the jury, to whom the same legislature of 1855 designed to give some authority to decide, *at their discretion*, both the law and the fact, would so construe it as to require evidence of knowledge, or be content with such an opinion of the judge. If convicted by the jury, the court could not save the party convicted by any judicial finding that there was no unlawful intent, there being an intent to remove the person as a fugitive.

I am not disposed to deny that there must be an unlawful intent, in order to constitute an offence under this section of the statute. But what is that unlawful intent? It is an intent to do the thing which the section was designed to prevent; and most clearly it was designed to prevent the removal of a person who is not the slave of the claimant, on a claim that he is such. It is not essential, therefore, that the party removing, or assisting, should have knowledge that the person removed or attempted to be removed was not a slave, or was not the slave of the claimant. He must not act in the removal *unless he has knowledge that he is such slave*. If he does, he incurs the penalty, because it is not said, or implied, that he shall act with knowledge that

the claim is false. It is sufficient that he acts wilfully in depriving a party of his liberty on a claim which is not in fact well founded. The mistake in the argument that there must be knowledge that the person removed was not a slave, because an unlawful intent is necessary to constitute a crime, is not so much a mistake of the principle of law, as a mistake in the application of the principle to this class of cases. Unquestionably there must be an intent to remove the person *as one from whom service and labor is due*, and *this is the unlawful intent*, if it is not due. If the removal were by receiving and carrying him out of the State as a passenger by rail car, steam-boat, or stage coach, or in a private carriage, without knowledge that he was claimed and removed as a person from whom service or labor was due, then no penalty would be incurred.

We do not need the aid of the petitions to assure us that section 15 of the act of 1855, so far as it relates to civil officers, (which is section 63, of chapter 144, General Statutes,) was designed not merely to prohibit any civil officer within the State from acting in his official capacity in the arrest, imprisonment, detention, or return, of a fugitive, but that it was designed, in the language of the petition, to prohibit any such officer from acting "even as a private citizen." The general terms of the enactment cover other than official acts, and the section cannot be construed otherwise without rejecting material portions of it. In fact it was useless as a prohibition of official acts, for the act of 1843 prohibited the officers of the State from acting under the fugitive slave law of 1793, and the first section of the act of 1855 applied the provisions of the act of 1843 to the fugitive slave law of 1850, although that law did not profess to give any State officer power to act in the arrest or return

of a fugitive. Where, then, was the necessity of a further prohibition of official acts? What could the officers of the State do, officially, under any State law, in the arrest, detention, or return? But this is not all which shows that their aid as private citizens was to be prohibited. The section, after enumerating the sheriffs, deputy-sheriffs, jailers, coroners, constables, and police officers, (being careful to include the coroner, who might in certain contingencies act as sheriff,) and thus, by special designation, prohibiting officers who could act officially in arrests and imprisonments; proceeds to provide equally for the punishment by like fine and imprisonment, of any "*other officer of this Commonwealth;*" or any "*district, county, city or town officer,*" who shall arrest, imprison, *detain*, or *return*, or who shall "*aid* in arresting, imprisoning, *detaining*, or *returning*, any person, for the reason that he is claimed or *adjudged* to be a fugitive," &c. What official acts can the state treasurer or auditor, the county treasurer or register of deeds, the town clerk or assessors, or collectors of taxes, (to say nothing of fence viewers, surveyors of highways, and of lumber, and measurers of wood and bark,) perform in the arrest or rendition of fugitive slaves? But they are clearly within this part of the statute, and it is nugatory unless it embraces them with others, who, like them, cannot act officially in such cases. It is quite evident from all the circumstances attending the passage of this act, that this provision in relation to officers was based upon an assumption, that the State may forbid *all* its officers to interfere, *by way of aid*, "*even as private citizens;*" which is certainly a large amplification of Mr. Justice Story's remark, implying that a State might prohibit its officers from executing the powers which

the act of 1793 intended to confer upon a very limited number of them.

So in relation to the provision for punishing any officer or member of the volunteer militia who arrests, or aids in arresting, &c. What act can such officer or member do, officially, in arresting or imprisoning a fugitive? But the next section, (section 64, General Statutes,) providing that the volunteer militia shall not act in any manner, &c., was intended as a prohibition of the performance of military service, and thus shows that the provisions of the preceding section were intended to restrain aid as private citizens. Furthermore; that aid as private citizens is all the aid that is now prohibited under the section in relation to officers and members of the volunteer militia, is evident from the fact that section 65 of chapter 144, General Statutes, passed originally in 1858, exempts from the prohibitions of the statute all acts of military obedience and subordination. What acts, having any connection with the return of fugitive slaves, can the volunteer militia perform, *as militia*, except acts of military obedience? They may render aid with uniforms on, and guns in their hands, perhaps, but if they are not acting under orders their acts will not be the acts of the *militia*.

I might urge that certain sections of the act of 1855, which were repealed in 1858, serve to show the scope and intention of those which remain; but, waiving that argument, I will call one more witness, to wit: the Report of the joint committee which introduced the bill in 1855. The committee must be supposed to know what they meant in framing the bill; and the two Houses, with the printed report before them, may well be presumed, when they

adopted the language of the committee, to have adopted the sense in which the committee used it.

The report exhibits an elaborate attempt, by the citation of divers provisions of the Constitutions of the State and United States, and by the selection of paragraphs here and there from the opinions in *Prigg vs. Pennsylvania*, to give to the bill reported, the semblance of a constitutional enactment; at the same time that it shows a very determined purpose to manufacture a law which should nullify the execution of the fugitive slave law in Massachusetts.

The committee say, "Massachusetts stands second to no State in this Union in loyalty to the provisions of the Constitution of the United States." And again, "Massachusetts disclaims all intention of obstructing or evading any constitutional act of Congress." Following the first of the above extracts, however, we find: "But when she is asked to violate the fundamental principles of *that* Constitution as well as her own, she unhesitatingly throws herself back on her rights as an independent State. She cannot forget that she had an independent existence and a Constitution before the Union was formed. Her Constitution secured to every one of her citizens the right of *trial by jury*, and the privilege and benefit of the writ of habeas corpus, whenever their liberty was at stake. These essential elements of independence she has never bartered away. She will not suffer them to be wrested from her by any power upon earth." Farther on they say: "Your committee, therefore, are fully of the opinion that *every person living peaceably within the limits of the State*, and conforming to the laws of the State, is entitled to the protection of the State, and that the State is bound by her Constitution to give to *all her subjects*, whenever their liberty is imperilled, the benefit of the habeas

corpus and the *trial by jury*. And referring to the bill, they say among other things of certain sections, that they "are for securing the right of trial by jury, as well as of the writs of habeas corpus and of personal replevin." Again, "the seventh and eighth sections," (comprised in section 62, chapter 144,) "are intended to punish by fine and imprisonment *all those who shall be instrumental* in transmuting a freeman into a slave, whether by sending into slavery any man who has always been free, or by returning one who has escaped, either to a person other than the slave master from whom he escaped, or to any one to whom his service or labor is not due," &c. Again, "The ninth, thirteenth and fourteenth sections are for the purpose of *prohibiting Massachusetts officials of every kind from acting at all* for the return of fugitive slaves."

Who will longer doubt the design? Who will deny that the language of the enactment is adapted to its accomplishment?

The examination of the legislation of 1859, in relation to the writ of habeas corpus, must form part of another letter.

Cambridge, January 24, 1861.

### Personal Liberty Laws....No. 5.

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I proceed to the consideration of the legislation of 1859, in relation to the writ of habeas corpus. Prior to that time, when the party detained, and whose discharge was sought, was in the custody of the marshal, deputy marshal, or other like officers of the United States, the writ of habeas corpus was not issued to the sheriff, commanding him to take and bring in the body, but was issued to the officer holding the party in custody, commanding him to bring in his prisoner and to show the cause of his detention. The act of December 21, 1859, changed the law in relation to that class of cases, by authorizing or requiring the judge, or court, to issue a writ of habeas corpus, commanding the sheriff to take and bring in the body, and to summon the officer holding the party, to show cause.

In a late "Reading upon the Personal Liberty Laws," by a very distinguished jurist, it is assumed that the writ can no longer be directed to the marshal by reason of this change; and that this shows a mistake in the "Address to the citizens of Massachusetts" urging the repeal of the unconstitutional provisions. I am not disposed to argue that. We will suppose such to be the result. The change made by the act, then, is one by which the marshal can no longer be required to bring in the body of any person held by him, but the sheriff is required to *take* and bring in the person held by the marshal. Now it hardly needs an argument to show that it must have been intended that the sheriff

should do what he is thus commanded to do ; that is to *take* the party out of the custody of the marshal into his own custody. No other change is made in this respect. All the requisition upon the marshal is to show cause why he claims to detain the prisoner. The provision applies to all cases where the United States officer has the custody.

But it is quite clear that the sheriff has no right to do what he is thus commanded to do, if the process in the hands of the marshal is lawful. This is now admitted, and must be admitted, because the Constitution and laws of the United States authorize and require the marshal to hold his prisoner, and that authority being superior, the legislature had no right to authorize the sheriff to do what he is under this change required to do. And this not merely because the marshal happened to have priority of custody, for it was supposed to be known, when the writ was applied for, that the marshal had the party in custody. The command is to take the party, notwithstanding that fact. The law must have been designedly altered for the very purpose of requiring the sheriff to violate that custody by *taking* the party. Is not the law, then, in its design, and in its effect if executed, in conflict with the law under which the marshal is required at the same time to retain the custody? What prevents its being executed according to its letter except this conflict? The conflict is not accidental, but of purpose. It is not one that exists in some unanticipated case. The antagonism presents itself in all cases to which the change was designed to apply, or can apply. The command is void, the sheriff is not bound to obey it, and cannot lawfully obey it, because of this antagonism, and this seems, beyond all peradventure, to prove the unconstitutionality of the change.



It will not be an answer to all this, to say that if the process under which the marshal holds his prisoner was not regularly issued, the sheriff may lawfully take the prisoner from the marshal, by virtue of his writ. Who shall judge whether the marshal's process is regular or not? Certainly not the sheriff. He cannot require the marshal to show his process, and if he could, has no power to try, or sit in judgment upon the question, whether it is or is not valid. That is the business of the court.

I should not have supposed it necessary to press this argument with such particularity had it not been argued that the law is constitutional, because if the party is in the lawful custody of the marshal, the sheriff will not attempt to take him, but will merely obey the other command of the writ, and summon the marshal to show cause. But why shall not the sheriff take the custody? Certainly not, because the statute does not purport to authorize it. Certainly not, because the writ does not in terms require it. The command to take the custody is quite as imperative as the command to summon the marshal. In fact, the latter command may be said to be only an incident to the taking of the custody by the sheriff, for otherwise the writ will lose its distinctive character, and will not be a writ of *habeas corpus*, but only a writ of summons to the marshal to show cause. It does not summon the marshal to bring in the body. Such are not its terms; the sheriff cannot require him to do so, and the marshal will not be in contempt if he does not bring his prisoner. What kind of a *habeas corpus* is that? Suppose, if you please, that, according to the decisions of the supreme court of the United States, when the writ from the state court commands the marshal to produce his prisoner, he is not bound to do so if the party is held

under lawful process, but is only bound to show cause. The marshal in neglecting to obey the requirement of the writ when directed to him, would do so under the peril of being in contempt, and of being punished, therefor, if it was found that his process was not regular. Whereas, under the present state of the statutes, if it is found that the prisoner is unlawfully detained, the court cannot set him free, because he is not there; and nobody is to blame for this result!

No person can have greater reason than I have to be assured of the folly and incompetency of the majority of the Legislature of 1859; but I freely acquit them of the superlative stupidity of intending to produce the change which they made on this subject, whether the old writ, directed to the marshal, may or may not still be issued. They escape the imputation of this stupidity, by the fact that they intended that the sheriff should obey the command and take the prisoner; and if they had had a constitutional right to make such a change, it would be the duty of the sheriff to serve the writ accordingly.

I have been informed, that although it may have been one of the motives which led to this change of the habeas corpus, to take a fugitive slave out of the custody of the marshal, and then admit him to bail, and to try all questions by a jury under the State law, it was not the motive or the exigency which led immediately to this legislation of 1859. It appears that the committee on the judiciary in the House reported a bill providing, that every person arrested or imprisoned by reason of the seventh section of the 98th chapter of the acts of Congress, approved 8th August, 1846, might, as of right, prosecute a habeas corpus, &c. This was amended so as to include any person arrested or imprisoned

under any act, resolve, or vote, of Congress, or either House thereof, and was thus passed and sent to the Senate, where the bill was amended by striking out the whole, and inserting a provision making this change, so that in case any party was held by the marshal, deputy marshal, or other like officer of the United States, the writ of habeas corpus should issue, commanding the sheriff to take him. In this form it was passed in the Senate and sent to the House, referred to the judiciary committee, and Increase Sumner of Great Barrington, from that committee, reported that "it ought to pass," which it did. As the member from Great Barrington has united in the Address in favor of the repeal of the laws which tend to interfere with the custody of the marshal, it is to be presumed that he has seen the error of his ways in this particular, and it is to be hoped that others will do likewise.

Now this change covered precisely the case of the fugitive slave, in the custody of the marshal, as well as if that was its whole object. But admit that another, and the main object of the change, was to take a recusant witness, who should be arrested on a *capias* issued by a United States court, or by Congress, or either House of Congress, out of the custody of the marshal or other officer who holds him under the process. If that process is lawful, this is just as much an unconstitutional exercise of power as the other—not concurrent, not co-ordinate, but brought into operation by the exercise, in the first instance, of the authority of the United States in making the arrest; and intended to be antagonistic to that arrest by and under the power of the United States. It will not make the legislation any the more constitutional, that it had two unconstitutional purposes in view instead of one. It is just as nugatory for the

one purpose as the other ; for if the right of the United States court, or of either House of Congress, to issue the *capias*, is to be questioned, the sheriff cannot determine that question, and the State has not the right to violate the custody of the marshal, under his process, until the question is determined, and determined against the lawfulness of the arrest.

It is one of the evils of this anti-slavery crusade against the Constitution and laws of the United States, that by means of the "accursed eloquence," as it has justly been denominated, of the declaimers about the rights of "free citizens," meaning thereby the peculiar free citizens, we are in danger of being led to regard the government of the United States, not as our government, one of which we are citizens, and to which, as far as its powers extend, we owe a duty equal to, or it may be said superior, to that which we owe to our State government, for the reason that so far as its powers extend it is the superior government ; but, on the contrary, we view it as a kind of foreign jurisdiction, to the tribunals and organs of which we are not to trust, and against which we are to erect bars of prohibition, by the interposition of antagonistic State authority. It is by the same process of reasoning respecting the tariff, that South Carolina has regarded the government of the Union in the same light. She is restive under one operation of the Constitution and laws of the Union. We are so under another. And thus the State organizations, which have been regarded as elements of stability and strength to a Republican Union, have become elements of weakness and disaster.

I claim thus to have maintained all that I asserted in my first letter respecting the unconstitutionality of the several provisions of chapter 144, General Statutes, and something

more. I have shown by incontrovertible proof, that the express intent and purpose of the act of 1855 was to delay, obstruct, and hinder, the execution of the fugitive slave law; that it is well adapted to the end designed; and that it does effect that object, if not by taking the fugitive from the custody of the marshal and trying all questions by a jury, by assuming so to order, and so to do. The act of 1859 is of the same character. And therein consists their unconstitutionality. If the provisions to which objection has been made, do not operate, legally, as an entire nullification of the fugitive slave law in this State, it is because they cannot be executed by the judicial tribunals, on account of their conflict with the laws of the United States. But the practical effect must be to prevent attempts to reclaim fugitive slaves, because of the embarrassments and obstructions which they purport to authorize, the penalties they denounce, and the anticipation of forcible resistance and defeat, which is encouraged in the forbidding, so far as is possible, the use of military force to prevent riot and bloodshed.

And now the question comes to us, as one of right and conscience: Ought not these provisions to be repealed?

I have been the more earnest in this exposition of their true character, because upon the action of the present legislature respecting this subject, may depend the question of the final dissolution of the Union.

This practical nullification is a wrong done to the slave States, excused, in some measure, as has been said, by the repeated outrages in those States upon citizens of the free States; but not thereby justified. This wrong is principally done to the border slave States, in which, comparatively, few of these outrages have been committed. The action of these border States will determine the question whether the

Union shall, or shall not, be dissolved. If they adhere to the Union, the attempt at secession by the cotton States, will, in all probability, be defeated, without any marching of armies, but by a reasonable attempt to execute the revenue laws, and by other appliances of a peaceable character; and they will be a wiser, and it is to be hoped, a better people. But if the border slave States unite in secession, coercion will be out of the question. The idea of a border warfare, along the whole frontier, from the Atlantic to Kansas, and the marching of invading armies from the North into the South, to reduce the people to subjection, is not to be entertained, even if the result might be submission. If the Union cannot be preserved but by a war of extermination, it is far better that it should be dissolved.

If we suppose that there is no danger that the border slave States will be drawn into secession, we deceive ourselves. It is true that the present industrial interests of the border States will not be promoted by a dissolution; but there are ambitious and reckless men there, particularly in Virginia, who are urging secession, and who may yet force those States into it, as like men have forced the cotton States into that measure. The consequence of such a dissolution would doubtless be the extinction of slavery in the border States at no very distant day, by the flight of slaves to the North and by their sale, in some haste, to the South, to prevent such an exodus. But the flight would give us a population which we do not desire, and would be the cause of quarrels and wars which would be to the advantage of neither side.

We may suppose that in case of a dissolution drawing the line between the slave and the free States, we shall be at a safe distance from this border warfare. Will it be honest, perhaps it may be asked, will it be assuredly safe, for us to

stand out in a refusal to repeal these offensive, unconstitutional laws, and leave the border free States to take their chance of the consequences of a dissolution? Will Pennsylvania be drawn to us by the cords of love if we thus expose her? Will Ohio, with all her free soil principles, thank us for a course which tends to give her a hostile frontier along her whole Southern border? I am assured that she has no "personal liberty law," notwithstanding all that has been said upon the subject. If she should be alienated, is the middle State confederacy, which has been threatend, so utterly impossible? In the event of a secession of the border slave States, would not the dread of a border warfare between the free and slave States justify them in any combination for their own protection, even if it were accomplished without much regard to the interests of any State which, by her persistent refusal to conform to her constitutional obligations, had contributed to the danger? Doubtless New England could exist by herself; but her interests will not be promoted by such separate nationality; and moreover, Massachusetts is not all of New England.

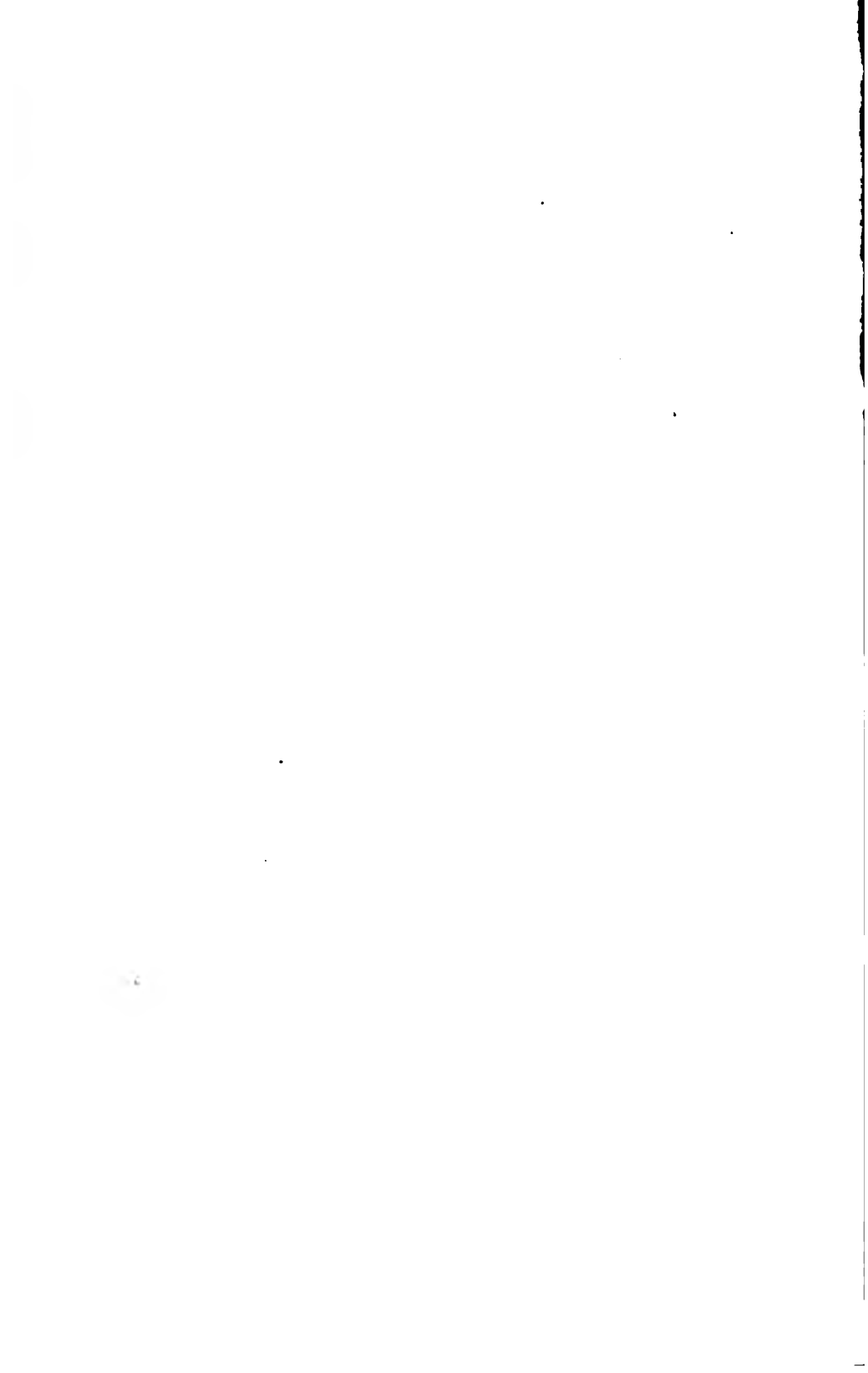
We may believe that such middle State confederacy cannot be organized, on account of a diversity of commercial and political interests; and I admit that it seems to be somewhat improbable, though not impossible. But there is another aspect in which the matter presents itself, which is open to no such objections. While I admit the constitutional right of the slave States to have a fair Fugitive Slave Law fairly executed, I shall endeavor in remaining letters to show that they have no right to have slavery introduced into the Territories; that the Constitution does not carry it there—the opinion of the six political judges of the supreme court to the contrary notwithstanding. Congress, however,

may allow its introduction. And if Pennsylvania and other border free States shall believe that Massachusetts is stolidly reposing "on her rights as an independent State," on which she so "unhesitatingly threw herself back" in 1855, and by her persistent refusal to repeal her obnoxious laws is interposing obstacles to an adjustment of existing difficulties; what shall hinder them from agreeing to the Crittenden—or, the Breckinridge—compromise, with strength enough in its support to overrule the opposition of Massachusetts and any other New England State that concurs in her policy. Such a compromise we know already receives large support in Pennsylvania.

And now let us, each and all, submit this question to our careful and dispassionate consideration. If we shall alienate other States now in sympathy with us, and thereby a compromise is made which permits the introduction of slavery into the Territories, present and to be acquired, will the retention of the Personal Liberty laws upon our statute book furnish to the country or to humanity a satisfactory equivalent?

Cambridge, January 28, 1861.





# SLAVERY IN THE TERRITORIES.

## No. 1.

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The question respecting the admission of slavery into the Territories, is one upon which there is at present an "irrepressible conflict" *of opinion*, by reason of the belief which prevails, very extensively, among the people of the Southern States, that the Constitution secures to them the legal right to take their slaves into a territory, and that any act of Congress restricting the right to hold slaves in a territory is unconstitutional and void. And they derive their strong confidence in this belief from the opinions of a majority of the judges of the supreme court of the United States in the case of Dred Scott.

The idea that the Constitution secured the introduction of slavery into all the territories, seems to have had its origin in the fertile brain of Mr. Calhoun, and to have made its first appearance in 1847 or 1848. Prior to that time, so far as I am aware, it had not entered into the evil imagination of any one's heart to conceive such an absurdity.

If the Constitution gives such a right, the provision or provisions which confer it were clearly applicable to the territory north-west of the river Ohio, which was a territory of the United States on the adoption of the Constitution, and thus *it must have abrogated the famous ordinance of 1787, and have rendered nugatory any law of Congress restricting slavery in that territory*; and the applications of a portion of the people there for permission to introduce it, were alto-

gether unnecessary, and the refusals of Congress a humbug. For if the Constitution in one part of it carries slavery into the territories, the clause of the Constitution authorizing Congress to "make all *needful* rules and regulations respecting the territory, or other property of the United States," must be construed to be in harmony with such part, and thus not to limit or control it. Certainly it could not be "needful," or proper, to make a rule or regulation which would be in conflict with any right conferred by the Constitution. It would be preposterous to suppose that the Constitution, by a grant of power to make needful regulations, conferred upon Congress a right to destroy or nullify a portion of the Constitution itself.

So, again, if the Constitution gives such a constitutional right, as a legal right, which can be asserted and vindicated by the courts of the United States, all the agitation which convulsed the country respecting the admission of Missouri, the adoption of the Missouri compromise line, the acquiescence in it for so long a period, and the struggle respecting its formal repeal—can only be accounted for upon the supposition that the eminent statesmen of that period were but very sorry constitutional lawyers; for surely they had in 1820, occasion to subject the Constitution to a most rigorous examination in this respect.

The very fact that of all the great statesmen who framed the Constitution,—those who earnestly advocated it or as earnestly opposed it, and those who for half a century afterward administered the government in its legislative, executive and judicial departments,—no one had made the discovery of an interpretation of the Constitution which would put an end to all agitation respecting the extension of slavery; and which must settle also the right of the slave-holder to

take his slave into a free State and hold him there ; would seem to furnish a conclusive argument against such a construction. I ought to say, however, that it is quite possible that the supreme court have got such an admonition upon the subject that they will not venture upon the experiment of deciding that the Constitution secures a right to the slaveholder to introduce slavery into a State where it is prohibited ; but if we are saved from such a decision, it may perhaps be owing to the election of Mr. Lincoln and certain subsequent events. There is quite as good, and perhaps a better, semblance of reasoning for such an opinion than there is for a decision that an act of Congress prohibiting slavery in a territory is unconstitutional ; and a half a century of uniform construction does not settle much in these days.

In the department of political and legal theorizing, Mr. Calhoun was a man of great enterprise ; and the explorations of half a century, for the purpose of ascertaining the meaning and true construction of the great charter of American Union and government, did not deter him from claiming to have made new discoveries, which would subserve the purposes of his ambition. Many years since I heard that he said, when in college, that he would be President of the United States, or he would shake the government to its foundations. Whether he said it or not, he acted in strict accordance with the supposition of such an intention. Failing to accomplish his great purpose through the tariff and internal improvements, and failing to unite the South on nullification, so as thereby, if need should be, to organize a Southern Confederacy, he turned his attention to slavery, as a subject upon which, through Southern feeling, a union of the South might be accomplished, and the North be ren-

dered subservient; or the two sections be brought into collision, with a Southern Confederacy as the ultimate result. Such was the opinion of Mr. Benton, who had ample means for the formation of a sound judgment; and well known facts seem to warrant the conclusion. Mr. Calhoun did not live long enough to see the fruition of his hopes; but he sowed the dragon's teeth, and the seed, stimulated by the super-phosphates of six judges of the supreme court, and of Mr. Secretary Floyd, has at last sprung up in hosts of armed men, swearing allegiance to secession, and expecting, in the strength of their Almighty King Cotton, to go on conquering and to conquer.

Mr. Calhoun's first attempt to give to slavery a secure lodgment in the Territories seems to have come in the shape of a proposed Congressional enactment, extending the Constitution and certain acts of Congress over the Territories of California, New Mexico, and Utah, over which it was proposed to erect Territorial governments. Defeated in this, and evidently this was not enough, (because such an extension depended upon the will of Congress, which could not by any direct act of legislation extend the Constitution to places where it did not otherwise apply, and because the legislation of Congress asserting such a power of extension, could not be obtained,) we find very soon an assertion of the dogma, that the Constitution extended to the Territories of its own force and vigor, without any extension act, and that it carried with it protection to slavery there, because the owner of property has a right to go there with his property, and slaves are property. Mr. Webster met the doctrine at the threshold, and controverted it by conclusive arguments. He said: "The Constitution is extended over the United States, and nothing else. It cannot be extended over any

thing except the old States and the new States, which shall come in hereafter, when they do come in." Mr. Clay also denied it, saying: "Now, really, I must say that the idea that *eo instanti* upon the consummation of the treaty, the Constitution of the United States spread itself over the acquired territory, and carried with it the institution of slavery, is so irreconcilable with any comprehension or any reason which I possess, that I hardly know how to meet it." But he did meet it, and with a force of argument which might well convince any one but a predetermined disbeliever. Mr. Benton, and other distinguished politicians and jurists, utterly repudiated it. Something more was necessary in order to secure the object; and the next move seems to have been to make the supreme court a party to the measure, and by obtaining what appeared to be a judicial decision of the question, to quiet or overrule opposition to it.

It might perhaps be supposed that judges in the slaveholding States, surrounded by the excitement attending upon the subject, sympathizing with the advocates of the new doctrine, and having to some extent a community of interest with them, should, unless restrained by high judicial integrity and firmness, "listen favorably to argument." What influences induced a judge residing in a free State to make shipwreck of his judicial reputation, by uniting in such an attempt to control the legislation of Congress, is not so apparent. It is sufficient for our present purposes, that a majority of the judges appear to have been seduced into the belief that they had only to express their views upon the subject matter, in the shape and form of a judicial decision, and the controversy would be settled. If it had been a legal question, it would not have been necessary to settle it for the purpose of determining the whole case, so far as

Dred Scott and his family were concerned. But Mr. Justice Wayne told the story, in a single sentence of his opinion, when he said : “The case involves private rights of value, and constitutional principles of the highest importance, *about which there had become such a difference of opinion, that the peace and harmony of the country required the settlement of them by judicial decision.*” Vain hope, infatuated belief, that their intervention could settle a contested political question. Evil was the hour ; evil to the peace and harmony of the country ; evil to the principles of constitutional law ; evil to the character of the court ; evil to the reputation of those who concurred in it ; when six judges of the supreme court of the United States united in a sheer usurpation of the powers of Congress, and a gross perversion of legal principles ; in an interpretation of the Constitution which has no warrant in its language, and which is in conflict with an unhesitating practical construction of half a century, by all the departments of the government.

If disunion takes place, it will be occasioned, in some measure at least, by this unhallowed interference of the judges of the supreme court with the great political question of the day ; for it is quite clear that many and honest persons at the South rely upon these opinions to show that slave-holders have the right to carry their slaves into the territories, and to hold them there in servitude, not only irrespective of, but in defiance of, any legislation of Congress prohibiting slavery there ; and they therefore believe, very sincerely, that the Republican party is attempting to deprive them of a constitutional and legal right. And the denial of such right, in the free States, constitutes, so far as the border slave States are concerned, the “irrepressible

conflict," if there be one, between them and the free States.

If the United States are dissevered, I trust we shall have the satisfaction, and it will not be a small one, of seeing the secession carry with it a portion at least of the political judges who by their unwarrantable interference have rendered the controversy between the different sections of the country, upon this subject, of more difficult adjustment. And it may serve as an admonition to those of them who remain, to confine themselves hereafter within the proper sphere of their judicial duties.

Let me not be misunderstood. I have in former letters referred to the judgments of the supreme court as matters of authority. Perhaps some one may ask, have you no respect for the opinions of the judges of a court whose judgments you cite as conclusive? I answer: No respect whatever for their opinions or judgments when the court transcends its jurisdiction, usurps the powers of another branch of the government, and perverts facts and legal principles to subserve political purposes.

A particular examination of some portions of the Dred Scott case, will justify this language, strong as it may appear to be.

Cambridge, February 4, 1861.



### Slavery in the Territories....No. 2.

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I do not propose to examine at large the demerits of the decision in the case of Dred Scott. The part of it which attracts present attention is that which assumes to determine, as a *legal conclusion*, that the Missouri Compromise of 1820, restricting the admission of slavery north of latitude 36° 30', was unconstitutional and void; the reason being, that the Constitution extends over the Territories of the United States, and secures to slave-holders the right to enter the Territories with their slaves, and the right to hold them there in despite of any attempt at prohibition by Congress.

The determination of that question—even supposing it to be a legal question—was not only wholly unnecessary, but the effort to reach it was quite extraordinary. The majority of the judges held, that because Dred Scott was of African blood, and descended from slaves, he was not a citizen of the United States; that he could not therefore sue in the courts of the United States; and that the court in which the suit was commenced had no jurisdiction, for that reason. This settled the disposition to be made of that case and of any other suit which he might commence in the courts of the United States, and there was already a decision against him, in a suit for his freedom, in the supreme court of Missouri. Nothing farther was required to a final determination of his claim to freedom. It was certainly a strange proceeding, that the supreme court, without any necessity, should go farther under such circumstances.

Again, if the merits of the case had been regularly under consideration, the court might, on their own principles, have come to the conclusion that Scott and his children were not free, without any opinion respecting the constitutionality of the Missouri Compromise act. Scott had been held as a slave in Missouri. His master, Dr. Emerson, took him to Illinois and held him as a slave there. He then took him to Fort Snelling, west of the Mississippi, at that time part of the Wisconsin Territory, now part of Minnesota, where Scott married a negro woman held as a slave by another person; and Dr. Emerson afterward purchased her, and held Scott and his wife and child as slaves there, and took them thence to Missouri, holding them as slaves there. The six judges held that Scott was not free by reason of his having been taken to the free State of Illinois, because he did not claim his freedom while in that State. That having been held in Illinois as a slave, and carried back to Missouri, the laws of the latter State determined whether he was or was not a slave; and assuming to administer the laws of Missouri, and not those of the United States, they determined that his residence in Illinois did not operate to set him free. So had said a majority of the judges of the supreme court of Missouri. Now, by a similar process of reasoning, the six judges might have held, that the residence of Scott and his wife in the Territory was like his residence in Illinois in its operation upon the question of freedom; and that being actually held as slaves in the Territory, and then carried to Missouri, they were by the laws of Missouri still slaves. And this would have settled the whole case upon its merits, that is to say, its legal merits, in that tribunal. These circumstances serve to show that there was a determination to reach the question whether

Congress could prohibit slavery in the Territories, not because that was necessary to a full determination of the private rights of Dred Scott, but because, as was said by Mr. Justice Wayne, the case involved constitutional principles of the highest importance, *"about which there had become such a difference of opinion that the peace and harmony of the country required the settlement of them by judicial decision."*

With this evidence before us that the judges not only went beyond what the case required, but went beyond what was necessary, on their own principles, to determine the case on its merits, it should surprise no one to find that the questions which they undertook to settle, because in their opinion "the peace and harmony of the country required the settlement of them by judicial decision," were political questions, with which the court had nothing to do. It is fairly to be inferred that such was the fact from the opinions themselves. If they are not to be characterized as good specimens of stump oratory, parts of them might form very respectable portions of a Congressional debate.\* Mr. Justice

\* Witness the following extract from the opinion of Mr. Justice Daniel:

"In this attempt there is asserted a power in Congress, whether from incentives of interest, ignorance, faction, partiality, or prejudice, to bestow upon a portion of the citizens of this nation that which is the common property and privilege of all—the power, in fine, of confiscation, in retribution for no offence, or, if an offence, for that of accidental locality only.

"It may be that, with respect to future cases, like the one now before the court, there is felt an assurance of the importance of such a pretension; still the fullest conviction of that result can impart to it no claim to forbearance, nor dispense with the duty of antipathy and disgust at its sinister aspect, whenever it may be seen to scowl upon the justice, the order, the tranquility, and fraternal feeling, which are the surest, nay the only means, of promoting or preserving the happiness and prosperity of the nation, and which were the great and efficient incentives to the formation of this government."

Campbell speaks flippantly of what is "thought their fort by our adversaries;" meaning thereby those who contend that Congress had a right to exclude slavery from the territories; including, it would seem, Mr. Webster and Mr. Clay, who had made speeches in Congress in favor of the right of restriction, and Justices McLean and Curtis, who dissented from the opinion of the court. I have no recollection of ever seeing a similar instance of partisanship by a judge, in delivering a judicial opinion; but I have seen many in Congressional debates, and the fair conclusion is, that "our adversaries" were our political adversaries. The judges of a legal tribunal, in delivering their judicial opinions, never have *adversaries*. Mr. Justice Catron speaks of "the question of *infraction of the treaty*" through which Louisiana was acquired, by a supposed act of Congress, drawing the line, north of which slavery should not exist, on the thirtieth degree, as a question upon which no one would doubt what the decision of the court would be; as if the infraction of a treaty by an act of Congress was a proper matter for the interference and control of the court. And he said "The Missouri Compromise Line was *very aggressive*;" leading to one of two inferences, to wit: either that he was discussing a political question, or that if the line had been somewhat farther north, the act might, *in a legal point of view*, have been constitutional.

But admit that the phraseology and general course of the opinions furnish only *prima facie* evidence that the question under the consideration of the court was a political question; the fact that the question of restriction had, from the time of its first agitation up to 1847, and for years afterwards, been considered a political matter, for the decision of Congress, might well be considered as determining its

true character by an unhesitating practical construction. This, however, seems not to have been enough for the six judges, and I propose now to follow out what they saw fit to treat as a legal question, to some of its legal results, as deduced from their opinions.

If the provision in the Constitution authorizing Congress to "make all needful rules and regulations respecting the territory or other property belonging to the United States," applies to territory acquired after the adoption of the Constitution, it would seem to settle the power of Congress in reference to this question; for in the absence of any constitutional restriction, limiting this clause, Congress must judge what rules and regulations were "*needful*." The existence of slavery in some of the States, even if slaves were regarded as property, could not operate as a limitation upon this power. We find, accordingly, a most labored effort, in the "opinion of the court," to show that the clause does not apply to such after-acquired territory. For myself, I freely admit that it was not inserted in the Constitution with reference to any such territory, but my reason for this admission is altogether different from the reasons suggested by the court. My reason is, that the Constitution was made for the United States, as limited by the treaty of peace; that it looked to no acquisition of foreign territory—and of course contained no provision for the government of any such territory. And then it follows, "as the night the day," that the Constitution does not extend itself over any newly acquired foreign territory, nor can Congress extend it over such territory while it remains in a territorial condition. And it will follow, also, as an inevitable conclusion, that all questions respecting the government of such territory are political and not legal or judicial questions. "It

needs no ghost come from the grave" to assure us that a clause in the Constitution providing directly for the acquisition and government of farther territory, to be afterward admitted as States, would have most effectually secured the rejection of the Constitution; probably by the votes of all the New England States, as well as others. Besides, such provision, looking to the dismemberment of some foreign government, might have been justly regarded as offensive by Great Britain or Spain. But there are powers through which territory may be acquired, incidentally, although they were not inserted for that purpose. And when acquired, it is held by the sovereignty of the United States, as a nation, (not as a compact,) and the sovereignty or nation which holds it must provide for its government. The opinion of the court in *Dred Scott's* case admits this. (See 19 Howard's Reports, 448.) A better *authority*, however, to show that such may be the just conclusion, is found in 1 Peters' Supreme Court Reports, 542.

Some one may ask: "If this be so, how is it that new States are admitted, formed from such after-acquired territory; because, on that principle, the provision in the Constitution allowing the admission of new States cannot be construed as applying to new States formed from such territory?" The six judges assume, without reasoning, that the provision authorizing the admission of new States does apply to States formed out of such territory. But this is all a mistake, or a perversion. The Constitution containing no express provision for the acquisition of foreign territory, so that it is acquired only by the exercise of a power, broad enough to be sure, but not inserted for any such purpose; and there being no provision for the government of any such territory when acquired; it is preposterous to say that

the express provision for the admission of new States had reference to States to be formed out of territory which it was not proposed to obtain. And it can be conclusively shown that this constitutional provision for the admission of new States, had reference to States to be formed out of territory and out of States then within the limits of the United States. The discussion of that subject is foreign to the present purpose. But any competent investigator may find abundant proof, supporting this position, in the history of the adoption of the Constitution. And, without any inordinate vanity, I may claim to have shown the proof, in an "Address before the citizens of Cambridge, October 1, 1856."

It may be asked again, "How, then, are the States, formed from such territory, in the Union, and under the Constitution?" The answer is, that Congress has assumed the power to admit them, and the legislative department of the Union having admitted them, allowed them a representation, and extended the laws of the United States over them, with their assent, they are necessarily in the Union by the exercise of the authority which admits States; and they cannot be ousted. The Constitution is extended over them by the acts of admission, as it was extended over the States North-west of the Ohio, Vermont, and other States, within the limits of the United States, on their admission. The admission of Texas, which was never a territory of the United States, shows this. Any one who examines the history of the acquisition of Louisiana, and of the admission of the ungrateful State of that name, will see that Mr. Jefferson was clearly of opinion that an amendment of the Constitution was necessary in order to the admission of States outside of the original limits. But his

political friends showed him a practical way of amending the Constitution without the embarrassment of a formal addition to that instrument.

To return to the law of the territories, and to show farther that the question whether slavery shall be admitted is a political question, let us examine and see to what inevitable conclusions the doctrine of the six judges, that it is a legal question, settled by the Constitution, will lead us. In the "opinion of the Court," delivered by Mr. Chief Justice Taney, they say: "When the territory becomes a part of the United States, the Federal Government enters into possession in the character impressed upon it by those who created it. It enters upon it *with its powers over the citizen strictly defined and limited by the Constitution*, from which it derives its own existence, and by virtue of which alone it continues to exist and to act as a government and sovereignty. *It has no power of any kind beyond it*; and it cannot, when it enters a territory of the United States, put off its character and assume discretionary or despotic powers which the Constitution has denied to it. It cannot create for itself a new character separated from the citizens of the United States, and the duties it owes them under the provisions of the constitution. The territory being a part of the United States, the government and the citizen both enter under the authority of the constitution, *with their respective rights defined and marked out*; and the Federal Government can exercise no power beyond what that instrument confers, nor lawfully deny any right which it has reserved." \* \* \*

"The powers of the Government, and the rights of the citizen under it, are positive and practical regulations plainly written down. The people of the United States have delegated to it certain enumerated powers and forbidden it to



exercise others. *It has no power over the person or property of a citizen but what the citizens of the United States have granted. And no laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave, can enlarge the powers of the Government, or take from the citizens the rights they have reserved. And if the constitution recognizes the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guaranties which have been provided for the protection of private property against the encroachments of the Government."*

"Now as we have already said in an earlier part of this opinion, upon a different point, *the right of property in a slave is distinctly and expressly affirmed in the constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guarantied to the citizens of the United States, in every State that might desire it, for twenty years. And the Government, in express terms, is pledged to protect it in all future time, if the slave escapes from his owner. This is done in plain words—too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection, than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.*

"Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from

holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void, &c."

I have made extended extracts in reference to this point, in order that the six judges may have the benefit of all the truisms contained in them; and I have italicized several sentences which I shall have occasion to refer to, in their bearing and operation upon the conclusion that the Constitution carries slavery into the territories. The reasons thus set forth, to show why Congress cannot prevent the introduction of slavery, have a further and marked significance in relation to the question: What power has Congress over it after it gets there?

But let us first inquire what this slavery is, which the Constitution, through the instrumentality of these six judges, introduces into a territory despite the prohibition of Congress? It is an *absolute power*, unmitigated, unrestrained and unregulated; power, without responsibility, on the part of the master; *absolute subjection*, unlimited, unprotected and unresistant—subjection without redress—on the part of the slave. In order to show this, I will not stop to consider what would be the relation of master and slave in a territory into which settlers had entered before any territorial government had been organized, as in the case of California; but take the case of a territory duly organized by act of Congress, and where, of course, there is a body of law existing for the government of the population. Suppose that Congress, believing the opinions of the six judges to be an attempt to usurp legislative power, and an infringement of the powers of Congress, inserts into the act for the organization of the territory a prohibition against

the existence of slavery there. The legislature of the territory, supposing it to have one, (which, however, is not a legal nor even a political necessity,) does not assume to pass any law regulating the relation of master and slave, which, according to the organic act, cannot have any existence there. The slave-owner enters with his slaves, the Constitution in his right hand, and the opinion of the six judges in the matter of Dred Scott in his left. Now I ask, with all due respect to the opinion of any body who entertains the supposition that there is a semblance of constitutional law in the opinion thus expressed, what law, or code of laws, is to determine the right and power of the master over his slave, and to regulate their exercise? There is nothing in the Constitution, which the slave-holder carries with him, which prescribes what he may do with his slave, or what he shall forbear to do. The judges say that it authorizes him to take him there, and hold him as property. That is all. There is no law of Congress mitigating the servitude, or controlling the power of the master. Congress prohibited the existence of the slavery, but the prohibition is void. There is no statute of the territorial legislature restraining the passions of the master, regulating the service, limiting the subjection, or protecting the slave; for the legislative authority of the territory does not recognize the servitude. That is the beneficent office of the Constitution. The slave-holder does not, and cannot, carry with him the slave code of the State from which he emigrated, and which regulated his rights and duties while there. If he might, there would be as many slave codes in a single territory as there were States from which the slave-owners came, and the laws on that subject would soon be in inextricable confusion. The supreme court sent the slavery there, but it

may be presumed that there are some things that the supreme court cannot do. The six judges cannot compel Congress or the territorial legislature to enact a slave code for the territory; neither can they pass a law themselves to regulate the "peculiar institution" which they have introduced. After the decision in Scott's case, however, I ought, perhaps, to say this with some hesitation. The inevitable consequence is just what I have stated it to be. The right of property which the slave-holder carries with him into the territories, under such circumstances, is an absolute uncontrolled right, regulated and restrained by no law, and of course without responsibility to law. He may kill his slave whenever it suits his convenience, without any legal responsibility for the act; and he may eat him afterwards if it is his pleasure so to do. This is the constitutional right of the slave-holder, as fairly deduced from the opinions of the six judges. It is a consequence of their doctrine, from which they cannot escape. I do not state it too strongly. The decisions of the judicial tribunals in the slave States assume, as they must assume in general, that the local law, and that alone, *regulates* the relation of master and slave. And, treating the slave as property, in the absence of State legislation limiting and controlling the power of the master, his irresponsibility, even for the killing of his slave, has been emphatically and unhesitatingly asserted. It is true that in two early cases, one in Mississippi and one in Tennessee, it was held the killing of a slave might be murder, or manslaughter, at the common law. But the principle upon which these decisions were founded was examined and controverted in Georgia, and in that State, and in North and South Carolina, also, it is held that the common law is not applicable to slaves. Let the supreme

court of Georgia speak upon this subject, which they do in this language: "The civil rights of the master do not appertain to the slave; of these he can have none whatever." \* \* "It is absurd to talk about the common law being applicable to an institution which it would destroy." \* \* "Licensed to hold slave property, the Georgia planter held the slave as a chattel; and whence did he derive title? Either directly from the slave-trader, or from those who held under him, and he from the slave-captor in Africa. *The property in the slave in the planter, became thus just the property of the original captor. In the absence of any statutory limitation upon that property, he holds it as unqualifiedly as the first proprietor held it; and his title and the extent of his property were sanctioned by the usage of nations, which had grown into a law.*" \* \* "There is no sensible account to be given of property in slaves here but this. What were, then, the rights of the African chief to the slave which he had captured in war? The slave was his, to sell, or to give, or to kill."—9 Georgia Reports, 579, 580—*Neal v. Farmer*.

And so it follows, logically, from the opinion of the six judges, that the barbarism of Africa is introduced into the territories of the United States, by the Constitution, and protected there. A more odious libel upon the Constitution cannot well be imagined. The iniquity of the usurpation through which it is promulgated, is only exceeded by the atrocity of the result.

But this is not all.

Cambridge, February 14, 1861.

**Slavery in the Territories....No. 3.**

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Upon the hypothesis that the constitution, (there being no provision in it for the acquisition of foreign territory, and the formation of States out of such territory,) does not extend itself over territory acquired by conquest or by treaty, but that such territory is left to fall under the ordinary rules of public law, there is no difficulty respecting the regulation of slavery, or any other domestic institution or relation, there, while it is under a territorial organization. The laws of the country from which it was acquired, and which were in operation for the government of the inhabitants, remain in force until abrogated by Congress. If those laws prohibit slavery, it cannot subsist there until it is permitted. If they allow it, then it exists until forbidden, and it is regulated in the mean time by such rules as those laws prescribe for the limitation and restraint of the power of the master. And so of the other relations of life. The local courts remain for the administration of justice according to laws adapted to the wants of the inhabitants for the time being. Such alterations may be made upon the organization of the territory, and from time to time, as circumstances require. If the territory acquired is inhabited by Indians only, it may be supposed that no law of civilization exists there until it is introduced by the authority of Congress.

Suppose that, with a humble resignation to our "manifest destiny," we take another slice of Mexican territory, con-

taining a large population. There are laws already existing adapted to the existing civilization there. Any sudden introduction of the laws of the United States, without a change introducing the local municipal law of some State, also, would produce incongruity ; for the laws of the United States are founded, to a considerable extent, upon the legislation of the different States, adopting the State laws as the basis of the national jurisprudence. And the immediate substitution of the municipal regulations of any one of the United States would compel the conquered inhabitants to transact their daily affairs according to principles which they did not comprehend ; would provide for an administration of justice of the details of which they had no conception ; and would subject them to penal consequences of which they could have no anticipation. Well, Congress, aware of all this, in its wisdom, organizes the territory by the appointment of a territorial governor, and with a few simple provisions conferring upon him certain power and authority, considers its present duty performed. But the six judges say that the constitution forthwith extends itself over this territory. Now I should like to know what the constitution is going to do with itself after it gets there. It can enact no laws, and it carries none with it, either National or State. It provides that the trial of crimes shall be by jury, but there is no law for summoning or organizing a jury, or directing the place of trial ; and if twelve men could be got into a jury box, somewhere, they would have no sufficient knowledge what they were to do, or on what principles they were to do it. This may serve as an exemplification of the operation, in other respects, of this self-extended constitution ; which was made for States and not for Territories. The six judges, referring to divers consti-

tutional provisions, specify several things which they say Congress could not do there, because forbidden by the constitution. Most of them are matters which Congress would have no temptation to do. Among them, it is said, — “Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding.” Really! if the constitution does forthwith secure to the people of a conquered province the right to bear arms, it is certainly the most strange and wonderful constitution that was ever heard of. The proposition is pre-eminently preposterous. The denial of the right, and the disarming of the people, may be the very things which are necessary to prevent a revolt. How the people are to get a trial by jury until Congress provides for it, the six judges do not explain. And if Congress should make a law requiring a party accused to submit to a full examination, and thus compelling him, if guilty, to be a witness against himself; (which perhaps is not a very strange law to a foreigner, out of the British dominions,) until it shall please Congress to extend the jurisdiction of the supreme court over the territory, what are the six judges going to do about it. Are they quite clear that the constitution or laws of the United States will authorize the court to interfere, before any act of Congress provides for the exercise of their power, or for the organization of judicial tribunals in the territory? This illustration of their position that the constitution extends itself over the territory, furnishes very cogent evidence that the question is political and not judicial, and that their interference was wholly unwarrantable.

It may be objected that if the constitution is not extended over the territories, Congress can govern them by an arbi-



trary power ;—that there is no restraint upon the exercise of its authority. The objection seems plausible, but it is theoretical, and not practical. Congress is the legislative department of the government, elected according to the constitutional safeguards. The legal presumption, (contradicted in some particular instances I admit,) is, that Congress is not made up of bullies and blackguards, and that the rights of the people inhabiting the territories may be safely entrusted to the guardianship of the national legislature, during the time of their territorial existence. Such has been the practical construction, from the necessity of the case, in the absence of a constitutional provision. No territorial government has been organized according to the requisitions of the constitution, supposing that instrument to extend over the territories. The act of 1804, erecting Louisiana into two territories, provided that the legislative powers should be vested in the governor, and in thirteen of the most discreet persons in the territory, to be called the legislative council, who should be appointed annually by the President of the United States, and whose legislative powers should extend to all rightful subjects of legislation, subject to certain limitations. It extended certain enumerated acts of Congress over the territory, and made provision that the laws in force in the territory, not inconsistent with the provisions of the act, should remain in force until altered or repealed by the legislature. This was the practical popular sovereignty in the territories under Mr. Jefferson's administration. The judges of the superior court were appointed for the term of four years, instead of good behavior.

It may be noted here, that in this earliest act for the organization of a territory outside of the original limits

of the United States, Congress regulated the introduction of slaves just as far as that body pleased, by provisions *prohibiting any person from bringing into the territory any slave from any place without the limits of the United States, or any slave from any place within the United States, if such slave had been imported since May 1, 1798; and enacting that no slaves should be introduced except by a citizen of the United States removing into the territory for actual settlement, and being at the time the bona fide owner, and that every slave brought in contrary to the provisions of the act should be entitled to, and receive, his freedom.*

The residue of the province of Louisiana, not embraced in the territory of Orleans, was called the district of Louisiana. And it was provided, that the executive power of the governor of the Indiana territory should extend to and be exercised in the district; and that the governor and judges of the Indiana territory, (who, by the by, were appointed for a term of four years,) should have power to establish inferior courts within the district, and prescribe their jurisdiction and duties, and to make all laws which they might deem conducive to the good government of the inhabitants. There were provisos that no law should be valid which should be inconsistent with the constitution and laws of the United States, and for securing certain rights to the inhabitants, but there was no recognition of a right to hold slaves in the district, nor any thing restraining the governor and judges from passing a law prohibiting entirely the introduction of slaves.

The territory of Florida was organized in 1822, in a manner similar to that of Orleans, as above stated.

The acts for the organization of the territories of Washington, Kansas, and Nebraska, in 1854, contain provisions

for the appointment of judges by the President, or President and Senate, who were to hold their offices for the term of four years, and until their successors were appointed. If the constitution extended itself over these territories, all the appointments of judges were in conflict with the provision of the constitution, that the judges, both of the supreme and inferior courts, shall hold their offices during good behavior.

Will the supreme court hold that the supposed judicial acts of all the judges appointed in these and other territories, have been void, because they were not appointed according to the constitution. Will they even decide that the judges were officers *de facto*, and so that their doings were valid so far as third persons were interested in them, but that the judges themselves were wrong-doers;—trespassers when by their process the property of any one was seized; and homicides when through their sentence any one has been hung; the execution being valid so far as the marshal was concerned who executed the sentence; but being a murder on the part of the judges, they not being judicial officers *de jure*.

These considerations may well lead us to the conclusion that where territory is acquired outside of the original limits of the United States, it may, and in some instances must, be governed outside of provisions of the constitution which were not intended for such a contingency. If we acquiesce in the acquisition of such territory, we may trust the members of the national legislature to provide for its government, in the exercise of their discretion, under their responsibility to their constituents and to the civilization of the age. Some things may be done unwisely. Party interests may lead to oppression, as in the case of Kansas; (in

which, however, the outrageous wrong was on the part of the Executive, and not by Congress;) but any attempt of the supreme court to interpose its judicial power for the government of such territory, instead of, and in opposition to, the will of the political power to which it rightfully belongs, will only be productive of much greater, because more wide spread, mischief. The court cannot provide for the administration of justice in such territory. Take again the case supposed of a further acquisition of territory from Mexico. The Mexican law forbids slavery. Congress has appointed a governor, and has not legislated farther. A slave-holder goes there with his slaves, and the alcalde, or other judicial officer, sets them free. Will the supreme court issue a *mandamus*, or sustain a writ of error for the reversal of the decree?

But let us examine this doctrine that the constitution carries slavery into a territory, and protects it there, in its application to a territory for which Congress has undertaken to provide a body of municipal law.

In all cases where slavery exists in a State, unless there is some constitutional provision regulating it, the State constitution, either in express or general terms, gives ample power to the legislative department to provide rules and regulations for limiting and controlling the power of the master. Every slave State has its slave code or laws for this purpose; and the absolute right, which, according to the decision in Georgia, would otherwise exist, is thus modified. But if the constitution of the United States extends over the territories, and carries slavery there and protects it, and if Congress legislates for the territories *under authority given by the constitution*, as the six judges assume that it does, there is no power in Congress, by its legislation, to limit and

control the power of the master, and any attempt so to do must be void. This is a legitimate result from the opinion of the court as delivered by Mr. Chief Justice Taney. That opinion, as we have seen, denies emphatically that the clause of the constitution empowering Congress to make rules and regulations respecting the territory or other property belonging to the United States, applies to the government of the territories. And the court say in other parts of the opinion,—"as there is no express regulation in the constitution defining the power which the General Government may exercise over the person or property of a citizen in a territory thus acquired, the court must necessarily look to the provisions and principles of the constitution, and its distribution of powers," &c. "What is the best form" [of organization] "must always depend on the condition of the territory at the time, and the choice of the mode must depend upon the exercise of a discretionary power by Congress, *acting within the scope of its constitutional authority*, and not infringing upon the rights of person or rights of property of the citizen who might go there to reside or for any other lawful purpose." "The powers of the Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself." "It" [the Government,] "enters upon it" [the territory,] "with its powers over the citizen strictly defined and limited by the Constitution." "The Government and the citizen both enter it under the authority of the constitution, with their respective rights defined and marked out; and the Federal Government can exercise no power over his person or property beyond what that instrument confers," &c. I have cited some of these passages more at large in the previous number.

Now it is beyond question that the constitution confers no power, in terms, upon Congress to enact a slave code, or to provide any rules and regulations to limit the power of a master over his slave. It confers no power to legislate generally, except over the district which may become the seat of government, and places purchased for the erection of forts, magazines, &c., unless the clause respecting rules and regulations for the territory is applicable. Much less does it confer upon Congress any power to limit and control, or modify, any right conferred by the constitution itself.

I claim to have shown in my last letter that, upon the doctrine asserted by the six judges, the slave-holder who enters a territory where slavery is prohibited by act of Congress, enters with a constitutional right of absolute power over his slave. He cannot enter with any *smaller constitutional right*, by reason of any act of Congress which attempts to limit and control his rights. Will any one look at the grants of power to Congress, in the Constitution, and tell me which authorizes the enactment of slave codes for the territories?

The same principle leads to the conclusion that the territorial legislature cannot limit the absolute power of the slave-holder. If the citizen enters the territory with his rights and privileges regulated and plainly defined by the Constitution;—if the government enters upon it with its power strictly defined and limited; if they both enter upon it with their respective rights defined and marked out; and the government can exercise no power over his person or property beyond what that instrument confers;—(all which is elaborately set forth in order effectually to secure the right, whatever it is, with which the citizen enters;)—AND IF the right with which he enters, is, as we have seen it to

be, according to the principles of the six judges, the right of *absolute power over his slave as property*, assuredly there is nothing to be found in the constitution authorizing the territorial legislature to limit or control that constitutional right, either through any grant from Congress, or by any legislative power emanating from any popular sovereignty in the territory, for there can be none overriding, or overruling, the constitution. According to the opinions of the six judges, the constitutional right to enter the territory is an unqualified right, except so far as we may find in the constitution some *strictly defined* and *limited power marked out*, to modify and control it; and we find none. Even a general power of legislation, such as exists in relation to the District of Columbia, would hardly seem to be sufficient; but such a power is nowhere defined and marked out, for this purpose.

Nor is it readily perceived how the people of the territory, when they form a state government, can either abolish or control this constitutional slavery which has thus obtained a lodgment in the territory. They cannot by their constitution infringe upon a right guaranteed by the constitution of the United States.

Perhaps it may not be amiss to remark here, that upon the principles asserted by the six judges, this peculiar property possesses constitutional rights and privileges which no other species of property can claim; for the constitution does not recognize any right of property in horses, cattle, sheep, dogs, &c., nor contain any guarantees respecting such property; and the introduction of such animals into a territory may be prohibited, should Congress in its wisdom perceive any good reason for the prohibition. [Mr. Justice Daniel said, "that the only private property which the Con-

stitution has *specifically recognized*, and has imposed it as a direct obligation both on the States and on the Federal Government to protect and *enforce*, is the property of the master in his slave ; no other right of property is placed upon the same high ground, nor shielded by a similar guaranty.”]

But let us pursue the principles of the six judges in the case of Dred Scott to their legitimate consequences in another direction. Whether or not the constitution of the United States extends over the territories while under a territorial government, there is no question that it extends over all the states of the Union. Now if it be true that the constitution recognizes slaves as property, and therefore authorizes the owner to take them with him as property into a territory, and hold them there as slaves, against the prohibition of Congress, by the same reason he may take them to a free state, and hold them there as slaves, temporarily at least. It is not necessary to inquire what his rights may be if he voluntarily becomes a citizen of a free state. Entering the free state as a citizen of another state, with his slaves, for a temporary purpose, the six judges cannot hold, consistently with their principles, that the slaves become free ; for if the constitution recognizes a right of property which is paramount to the laws of Congress, it must also, *thus far*, be a right paramount to the laws, and even to the constitution, of a state. “The citizens of each state shall be entitled to the privileges and immunities of citizens in the several states.” “No person shall be deprived of life, liberty, or property, without due process of law,” &c. This right of coming within the free states, with slaves, for a temporary purpose, and of passing through such states, is strenuously maintained by many southern politicians ; and perhaps while I am writing the



supreme court are making up this very decision in the "Lemmon case," which occurred in the city of New York. Well, we have the slave-holder thus duly a resident, temporarily, in a free state, with his slaves, *as property*, under the protection of the constitution. Now suppose that while residing in or passing through the free state he kills one of his slaves, under such circumstances that deliberation and malice are clearly apparent. How shall the state's attorney proceed against him? Not under any law of the United States, for it has none adapted to the case, and the crime, if one has been committed, is not an offence against the United States. Not under any law of the state from which the master came, because, clearly, he did not bring a criminal code with him. No state executes the penal laws of another state. The free state in which the act was done has no slave code for the punishment of the slave master. These considerations furnish most cogent reasons not only against such a decision but against the admission of any amendment to the constitution allowing the holding of slaves even temporarily in a free state. As to fugitives it is the duty of the master upon the delivery to take the slave out of the free state immediately. In the case supposed, the course to be pursued is to indict the master under some statute punishing cruelty to animals, if there be such a statute, or else to indict for murder. But the mortal blow was dealt so dexterously, and the death followed so suddenly, that the ordinary characteristics of cruelty do not exist; and besides the state's attorney has been accustomed to regard a negro as a human being. So the grand jury, on his representation, indict for murder, the petit jury convict, and the court sentences the prisoner to be hung. But the six judges say that the slave was property,

and was held as such, under the protection of the constitution, up to the time of his death ; that the killing manumitted him, to be sure, but not in season, through the manumission, to constitute the crime of murder, because the act of killing was begun and perfected upon property. And so the conclusion must be that the indictment, trial, and conviction, were all erroneous, and the party entitled to maintain a writ of error, in order to avail himself of the rights secured to him by the constitution.

But Georgia has shown us, in the case of Tassels, that there may be a practical abatement of the writ of error, by hanging the plaintiff in error before he can prosecute his writ!

It remains to examine the position of the six judges that the constitution recognizes slaves as property.

Cambridge, February 19, 1861.

### Slavery in the Territories....No. 4.

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Having proved, from the nature of the question itself, and by a brief reference to the history of the territories from the acquisition of Louisiana to the organization of Kansas in 1854, that the Constitution does not extend over the territories while in a territorial condition, and that they have uniformly been organized and governed, in important particulars, according to the discretion of Congress, and not in compliance with what the Constitution would require if it was the paramount law there ; and having proved, farther, that the question whether slavery shall be allowed or prohibited in a territory is a political question for the determination of Congress, and not one of a judicial character to be settled by a court of law ; I proceed in the third place, to show, that if the question was one of a purely legal character, the "opinion of the court" that the act of Congress for the restriction of slavery north of latitude  $36^{\circ} 30'$ , commonly called the Missouri compromise, was unconstitutional and void, is, as a legal conclusion, utterly indefensible, being founded upon a false assumption of fact, for which there is no reasonable excuse.

The elaborate arguments of the six judges, to show that the Constitution extends over the territories, are entirely unavailing for the extension of slavery there, unless it is also shown that there is something in the provisions of the Constitution which overrules and annuls any action of Congress to restrain the introduction of slavery.

The fact that the express and specific powers of legislation granted by the Constitution to Congress, comprise no power to prohibit slavery, will not suffice to show that the restriction is void ; because it is evident that those express grants of power relate to the legislation of Congress which is to be operative within the States, and where of course the State authority provides for the local municipal legislation. It is quite clear that Congress possesses and exercises a power of legislation over the territories altogether beyond the limited grants of power which that body may exercise within the States. If it were not so, then there could be no code of general municipal law enacted for a territory ; for Congress could not authorize a territorial legislature, supposing one to exist, to do what Congress could not do of itself directly. Or if the doctrine of popular sovereignty were admitted, so that Congress had nothing to do but to provide for the organization of the territory, leaving the people to form their own territorial institutions in their own way, subject to the provisions of the Constitution, it would follow that they might prohibit slavery, unless there is something in the Constitution which affirmatively authorizes the slave-holder to take his slaves there, and protect him in retaining them in slavery.

The six judges so understand it, and in "the opinion of the court" attempt to maintain the position that the Constitution does affirmatively secure the right, by asserting that upon the opening of a territory for settlement all citizens have a right to enter with their property, and that the Constitution recognizes slaves as property. The substance of their conclusions upon this part of the case is thus stated in the abstract prefixed to the report of the case, viz. :

"The territory thus acquired, is acquired by the people of the United States for their common and equal benefit, through their agent and trustee, the federal government."

"Congress have no right to prohibit the citizens of any particular State or States from taking up their home there, while it permits citizens of other States to do so. Nor has it a right to give privileges to one class of citizens which it refuses to another. The territory is acquired for their equal and common benefit—and if open to any, must be open to all upon equal and the same terms."

*"Every citizen has a right to take with him into the territory any article of property which the Constitution of the United States recognizes as property."*

*"The Constitution of the United States recognizes slaves as property, and pledges the federal government to protect it. And Congress cannot exercise any more authority over property of that description than it may constitutionally exercise over property of any other kind."*

*"The act of Congress, therefore, prohibiting a citizen of the United States from taking with him his slaves when he removes to the territory in question to reside, is an exercise of authority over private property which is not warranted by the Constitution."*

I have given the language of the abstract thus at large, that there may be no room for a supposition that there is any misapprehension respecting the actual doctrine of those who assumed to determine this matter. We have before us the premises, and the logical sequence through which they state their conclusion.

The suggestion that a restriction of slavery in a territory would violate the amendment to the Constitution which provides that no person shall be deprived of life, liberty, or

property, without due process of law ; and the political disquisition of Mr. Justice Campbell to show that Congress does not possess the power of restraint, may serve adroitly to cover up the legal issue, but they have no just place in the case as grounds of judicial conclusion ; and as they are not made the basis of the decision, they do not require a refutation.

It is hardly expedient to prolong this discussion by an argument to show, that however it might be admissible in a political debate, and by way of illustration, to speak of the Federal Government as the "agent and trustee" of the people, those terms are entirely inapplicable and unwarranted in describing the legal relations of the government and people. Nor shall I stop to show that the position, that "every citizen has a right to take with him into the territory any article of property which the Constitution of the United States recognizes as property," is utterly without any foundation as a legal principle. The Constitution does not so say, and there is no principle of public law which supports the proposition.

But I propose to demonstrate, beyond the possibility of a fair denial, that the Constitution does not recognize slaves as property ; and that the whole foundation of the opinion, assuming the question to be a legal one, fails for this reason. In point of fact the absence of any such recognition in the Constitution is so palpable, upon an inspection of that instrument, that one cannot but marvel at the judicial confidence with which its existence is assumed.

Let us look at this matter a little more closely. There are three provisions in the Constitution which undoubtedly have reference to slavery, and where we understand that rights are recognized, as dependent upon its existence. In

neither of them is the term *slave* used. There is no inference, therefore, of a right of property, to be derived from the use of a word which, it might be argued, denotes or describes property. On the contrary, in each instance, the Constitution in referring to the slaves speaks of them as "persons," and not as property, and in neither of them does the subject matter imply that there is a property in the persons thus mentioned. In fact, in each instance, they are spoken of, either in connection with other *persons*, as having a personal *status*, or with capacities which do not belong to property.

The first instance in which any reference is had to slaves or slavery, is the provision that "Representation and direct taxes shall be apportioned among the several States, which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons." The part of this provision which refers to the slaves neither expresses nor implies the idea of property, either by its words, its object, or its connection with the other branches of the clause. The words are, "three-fifths of all other *persons*." Unless slaves are persons, they are not embraced in it. Persons bound to service for an indefinite time, dependent upon a contingency, seem to be embraced in it, but such persons are not property. So of persons bound to serve for the life of a third person. And persons bound to service during their own lives, are by no means necessarily so, even admitting that they may have that character. The object of the provision is to establish a basis upon which representatives and taxes are to be apportioned among the States, and that basis

is clearly *persons*, and not property. The other branches of the sentence, with which this part is in connection, relate to *persons*, and not to property. This clause, therefore, standing by itself, not only has no tendency whatever to a recognition of slaves as property, but furnishes an argument to show that the Constitution intentionally repudiated that idea, for otherwise they might at least have been designated as slaves, without circumlocution. This clause is not cited in the opinion of the court as a recognition of property.

The second instance of a provision having direct reference to slavery, is this: "The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress, prior to the year one thousand eight hundred and eight; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person." Here again there is no recognition of property, even by implication, but the reverse. It would have been more direct, to have said that slaves might be imported. The inference to be drawn from its omission, shows a determination not to recognize slavery by the use of the term which ordinarily designates the relation. Circumlocution is resorted to in order to avoid it. The subject matter of the migration or importation is "*persons*;" twice so designated; the further characteristics are not stated, unless it should be said that "*migration*" is not an ordinary characteristic of property. Some animals *feræ naturæ* have migratory habits, but the law does not recognize property in them. And yet this is one of the clauses cited, as we have seen, in the "opinion of the court," to show that the right of property in a slave is *distinctly and expressly affirmed* in the Constitution. And it is added, "The right



to traffic in it, like an ordinary article of merchandise and property, was *guaranteed to the citizens* of the United States, in every State that might desire it, for twenty years." This is an utter perversion of the terms and spirit of the provision, and of the well-known history of its introduction. It was introduced, on the allegation of some of the members of the convention from South Carolina and Georgia, that those States would not ratify the Constitution, unless some provision was inserted restraining Congress from prohibiting the introduction of slaves; the powers about to be granted to Congress, being broad enough for that purpose, if left unrestricted. It was quite well understood that the slave trade, whether "slavery" did or did not imply "property," was abhorred by the great majority of the people, for which reason it was feared that Congress, if at liberty, would prohibit it forthwith. The threats of a refusal to ratify produced a mere agreement not to interfere, for a term of years, with such action as any State might take on the subject. The scope of the provision shows that the subject matter was regarded with disfavor by the majority; that it was admitted to save the Constitution; that it recognized nothing except a restraint upon the power of Congress in that particular; without assuming to give any legal character whatever to any traffic, or to the subject matter of any traffic, which might be prosecuted or produced during the time of the restraint. To call this a *guaranty* of the right to traffic is not a legitimate use of the term. If England and France had, within the time, denounced the traffic as piracy, and captured the vessels engaged in it, there is nothing in this provision which would show that Congress was bound to interpose and object.

The third provision having a special reference to slavery, is the fugitive slave clause. "No person held to service or labor in one State, under the laws thereof, and escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up, on claim of the party to whom such service or labor may be due." This provision is cited in the opinion of the court as distinctly and expressly affirming the right of property in a slave; and it is added, that "the government in express terms is pledged to protect it in all future time, if the slave escapes from his owner." Now it is hardly necessary to say that there is nothing whatever in this clause recognizing *property* in a slave, and nothing pledging the government to protect any such property. The clause recognizes the existence of the fact that in some States *persons* are held to service and labor, from which they may escape, and provides that they shall not be discharged from it by the laws of the State to which they escape, but shall be delivered up. Here, again, so far as the Constitution indicates any thing upon the subject, it is adverse to the idea of *property* in the master. The framers of the Constitution understood the right use of words, and would never have spoken of labor and service as being "*due*" from *property*. Whether it is *due* to one person from another *person* through force or contract,—by reason of a "patriarchal relation," or by apprenticeship, or peonage—and what is the extent and requirement of the servitude, the Constitution in no way indicates. We know that it had reference to slavery, but for the rights of the master and the obligations of the slave, we must seek elsewhere. The Constitution has no recognition upon that

subject, except that the master is entitled to the return of the person who has escaped.

It is quite apparent upon the face of all these clauses in the Constitution, that so far from recognizing slaves as property, there is a *studied exclusion* of any recognition of slavery by name, and that when the framers were obliged to make any provision having relation to it, they purposely resorted to a periphrasis. And we have the evidence of Mr. Madison, that in the convention he and Mr. Sherman, and it would seem others also, objected to any acknowledgment or expression of an idea that there could be property in a man.

The clauses by which power is given to Congress to provide for suppressing insurrections, and by which the United States are bound in certain contingencies, to protect the several States against "domestic violence," comprehend, doubtless, servile insurrections, but they have no exclusive reference to them. So far as they may be considered, they negative the idea of property. Property does not get up insurrections.

Upon the whole, therefore, the assertion that the Constitution recognizes slaves as property is wholly inexcusable.

Lastly. If the Constitution, in any or all of the clauses in which slavery is referred to, did recognize slaves as property, it could fairly be construed only as a special recognition for the precise purposes for which the recognition was made; and the conclusion that, therefore, the slave-holder had a constitutional right to carry his slaves into a territory, and hold them there against the prohibition of Congress, would be a perfect *non sequitur*. It would not follow.

In terminating this discussion for the present, I take leave to say, with all due respect, that this attempt to control the

power of Congress to restrain slavery in the territories, was wholly unworthy the judicial tribunal from which it proceeded. Any one has the right to say that, because of the immense public mischief which this gross usurpation has occasioned, and the greater mischief which may yet result from it. Mr. Jefferson's apprehension of danger from the usurpations of the court are shown to have been the result of a wise forecast. The public good imperatively demands, at this time, that the question involved should be subjected to a frank, honest and unhesitating examination; and that the legitimate conclusions derived from such examination, should not be repressed by any extraordinary delicacy or courtesy.

Cambridge, February 25, 1861.

### Supplementary.

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I wish to call one more witness respecting the true construction and meaning of a section of the "Personal Liberty laws."

In a recent speech before the Committee on Federal Relations, Mr. Wendell Phillips endeavored to obviate and answer the objections which had been made to those laws; but I do not understand that he gives a different construction to any of the provisions from that which I have suggested. On the contrary, in relation to one part about which there has been a difference of opinion, he is reported to have said, "*the statute provides that a man who undertakes voluntarily to help in the return of a fugitive slave does so at his peril, and that if the alleged fugitive proves not to be a slave, the person so voluntarily aiding shall be punished.*"

Mr. Phillips is a lawyer, and in relation to this subject, especially, should know what he is talking about. He says nothing about "knowledge" that the person is not a slave; nor any thing about an "unlawful intent," further than the intent voluntarily to help in the return of a person as a fugitive, who is not a slave.

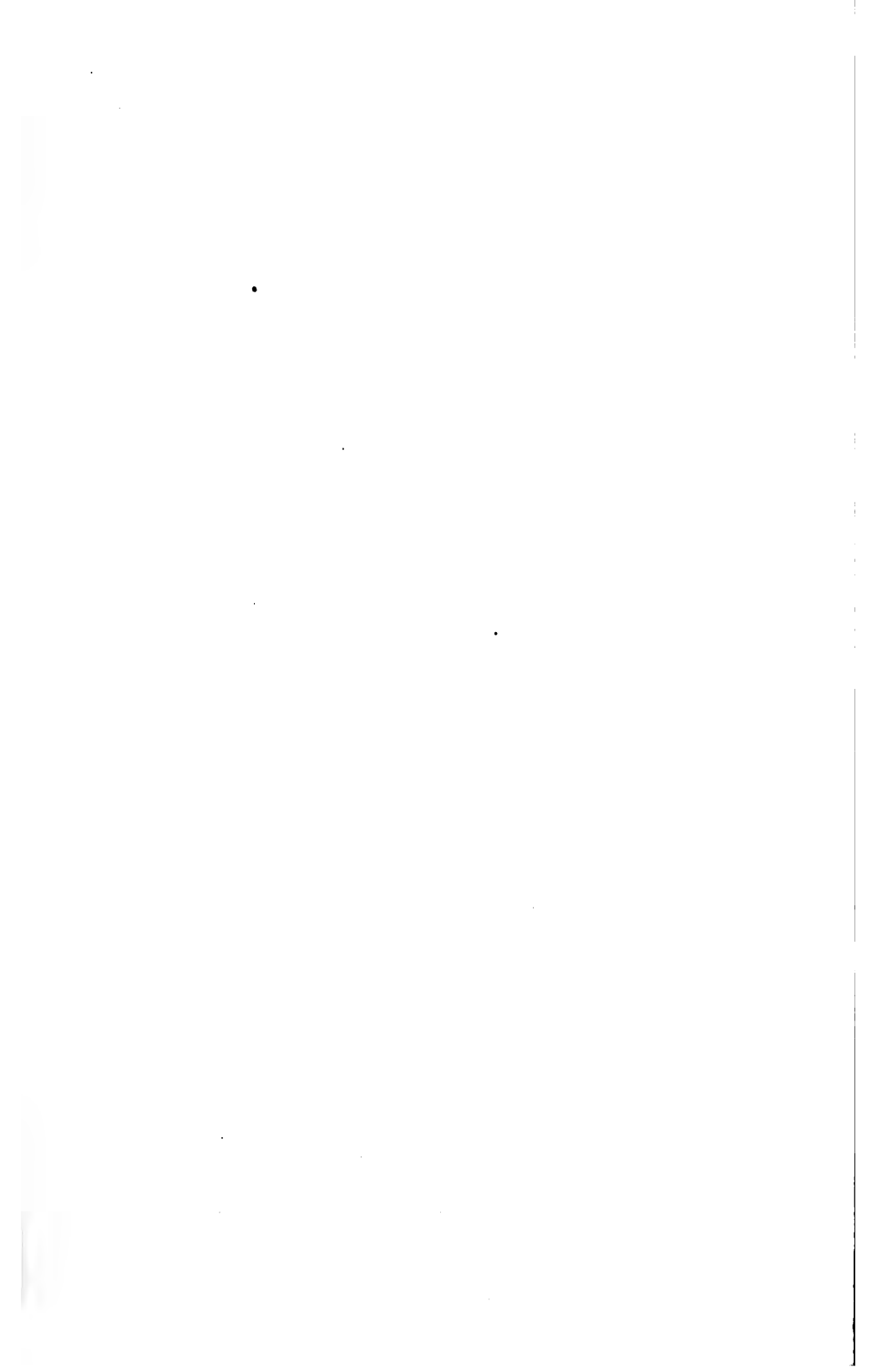
I admit, however, that Mr. Wendell Phillips cannot be offered as a perfectly reliable witness, because in that same speech he assumed to state that I said, of the time when Sims' case was under consideration, that "it was an amusing week;" whereas I said very nearly the reverse; to wit, that

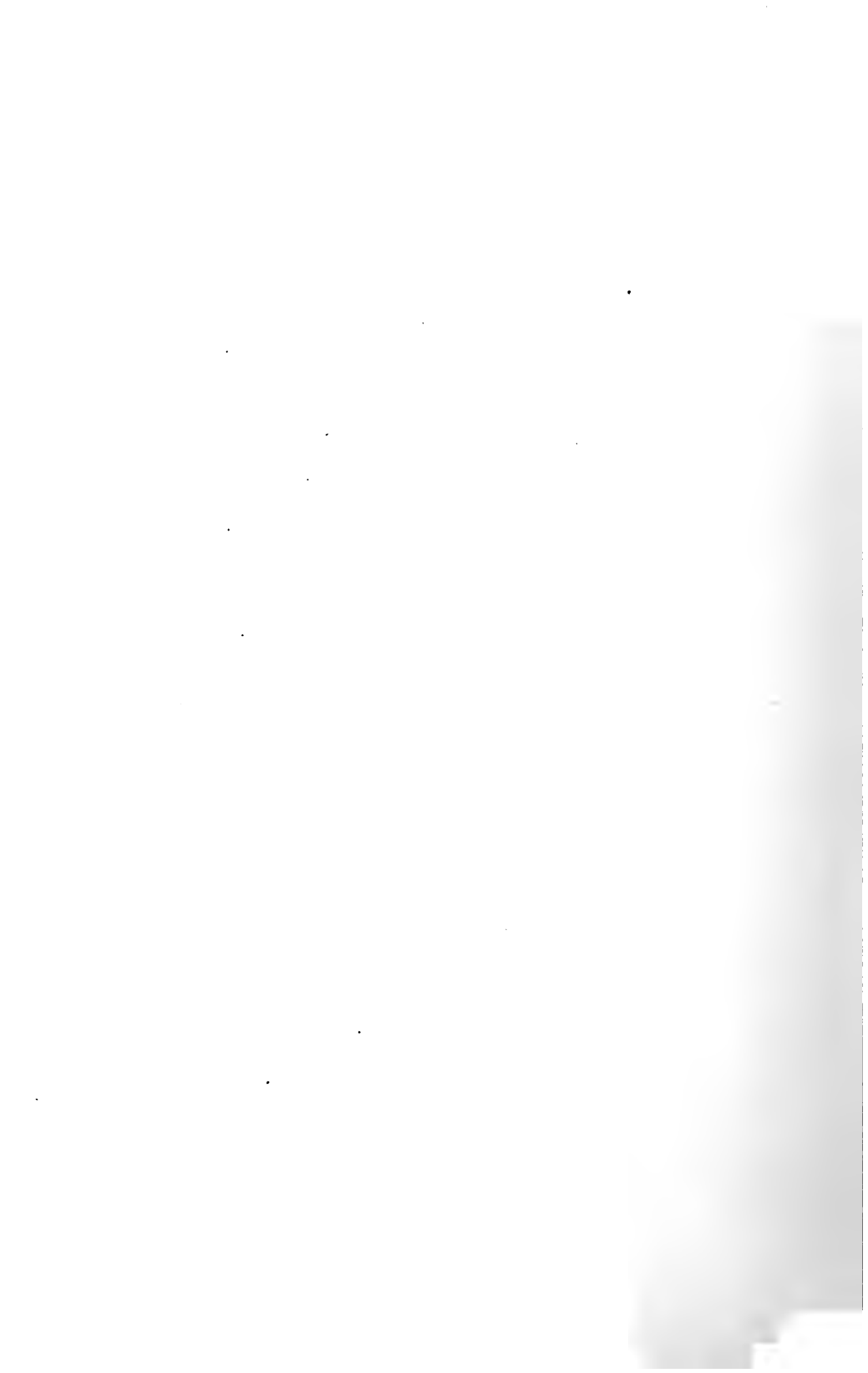
“an attempt to count the numerous motions, writs, warrants, and other legal proceedings, which were resorted to in order to prevent his rendition, with a statement of the nature and operation of them, might be more amusing and instructive at this day, than the proceedings themselves were at the time when they occurred.” (See page 30.) There was nothing said, either expressly or by implication, about “an amusing week.” If I were to say that Mr. Wendell Phillips’ account of his return to his house, followed by the crowd, on the day when he preached in the Music Hall, might be more amusing than the actual transit was at the time when it occurred; I certainly should not even imply that he or any one else found it an amusing experience at that time.

If the legal maxim “*falsus in uno, falsus in omnibus*” is to be applied, and this part of his statement detracts from the credit which might otherwise attach to his construction of the statute, I can only regret it.

J. P.

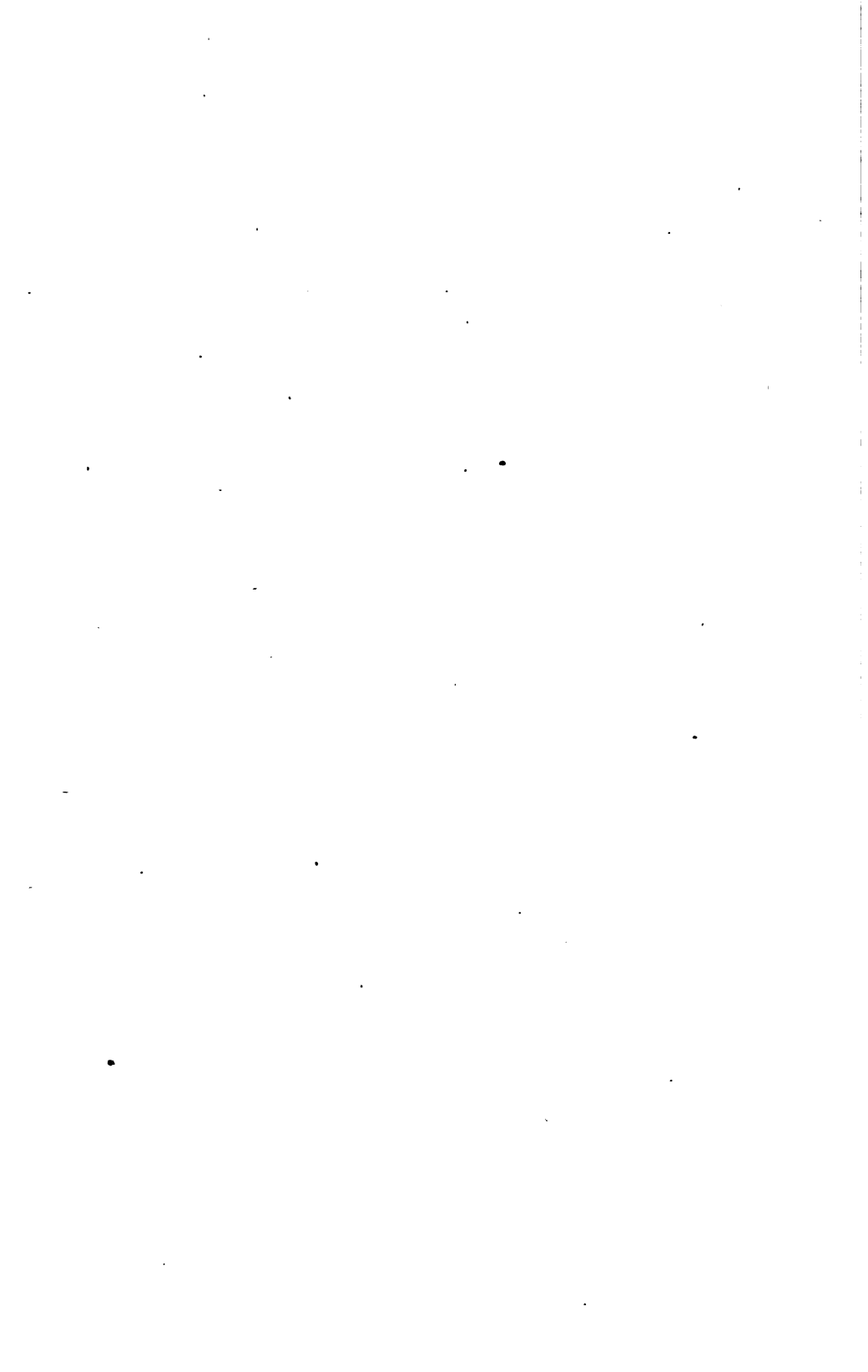
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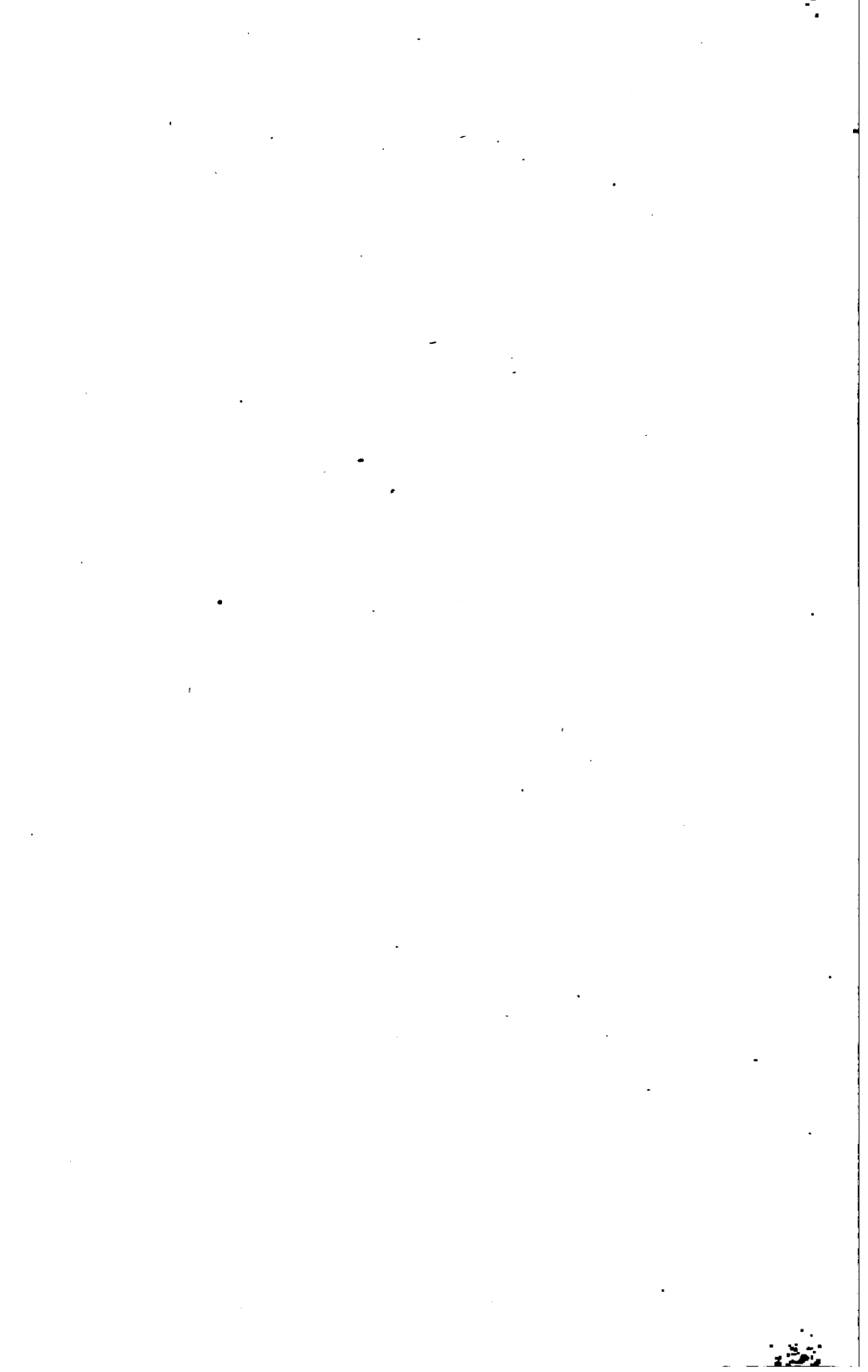












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**CONSTITUTIONAL LAW:**

**WITH**

**REFERENCE TO THE PRESENT CONDITION**

**OF THE**

**UNITED STATES.**

**BY JOEL PARKER.**

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**CAMBRIDGE:**  
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1863 Jan. 2.  
Gibbs  
in 1863.

# CONSTITUTIONAL LAW.

[From the North American Review, for April, 1862.]

1. *The Constitution of the United States of America, with an Alphabetical Analysis; the Declaration of Independence; the Articles of Confederation; the prominent Political Acts of George Washington, &c., &c., &c.* By W. HICKEY. Seventh Edition. Philadelphia. 1854.
2. *The Federalist, on the New Constitution, written in the Year 1788.* By MR. HAMILTON, MR. MADISON, and MR. JAY. With an Appendix, &c., &c. A new Edition. Hallowell: Glazier, Masters, and Smith. 1842.
3. *Constitutional Law. Being a Collection of Points arising upon the Constitution and Jurisprudence of the United States, which have been settled by Judicial Decisions and Practice.* By THOMAS SERGEANT, Esquire. Philadelphia: Abraham Small. 1822.
4. *A View of the Constitution of the United States of America.* By WILLIAM RAWLE, LL. D. Second Edition. Philadelphia: Philip H. Nicklin. 1829.
5. *Commentaries on the Constitution of the United States; with a Preliminary Review of the Constitutional History of the Colonies and States before the Adoption of the Constitution.* By JOSEPH STORY, LL. D., Dane Professor of Law in Harvard University. Boston: Hilliard, Gray, & Co. Cambridge: Brown, Shattuck, & Co. 1833.
6. *A Course of Lectures on the Constitutional Jurisprudence of the United States, delivered annually at Columbia Col-*

*lege, New York.* By WILLIAM ALEXANDER DUER, late President of that Institution. Second Edition. Boston: Little, Brown, & Co. 1856.

7. *Speech of HON. M. F. CONWAY of Kansas. Delivered in the House of Representatives, December 12, 1861.* Washington, D. C.: Scammel & Co. 1861.
8. *MR. SUMNER'S Resolutions. Resolutions declaratory of the Relations between the United States and the Territory once occupied by certain States, and now usurped by pretended Governments, without Constitutional or Legal Right.* Boston: Daily Evening Transcript, February 12, 1862.

“MR. PRESIDENT:—When the mariner has been tossed for many days in thick weather, and on an unknown sea, he naturally avails himself of the first pause in the storm, the earliest glance of the sun, to take his latitude, and ascertain how far the elements have driven him from his true course. Let us imitate this prudence, and, before we float farther on the waves of this debate, refer to the point from which we departed, that we may at least be able to conjecture where we now are.”

These memorable words of a great statesman, preliminary to the commencement of his magnificent reply to Senator Hayne, contain a sentiment which is of wide application; and in these days of difficulty and of trial, in which the stormy passions and illogical arguments of heated politicians obscure the principles of constitutional law, and the more insidious undercurrents of interested political aspirants are drifting us hard upon the breakers of disorganization, the prudence which that sentiment inculcates may well admonish us to take a fresh observation of that political sun by the aid of which the ship of state must be steered, if we expect to attain the haven of constitutional peace.

The civil history of the United States from the Declaration of Independence to the adoption of the Constitution is one

of great interest. The formation of State governments, with constitutions providing for a distribution of powers, in their nature legislative, executive, and judicial, among departments duly organized for their administration, in a manner best adapted to exemplify and enforce the great principle of self-government, by the grant of sufficient power to rulers, but with limitations necessary to the preservation and security of the rights of the people, was a problem which required and received the careful consideration of the most enlightened citizens of the several States, acting separately, and with reference to the previous laws, habits, and interests of their several communities. At the same time, the formation of a permanent confederation of the several States, with sufficient powers for the prosecution of the war, and for the promotion of the general welfare of the whole,—as associated governments, having to a certain extent a united purpose and a common interest,—tasked the energies and faculties of the eminent men who then composed the Congress of the United States.

The difficulties attending the formation of such a Confederacy, arising from the diverse, and in some respects adverse, interests of different States, were finally surmounted, and the Articles of Confederation were ratified by all the States; but it soon became apparent that the government of the Confederation was inadequate for the purposes which it was designed to subserve. There was not sufficient power to regulate the commerce of the country and to provide for the general welfare, and the conflicting interests of different States were endangering the peace and happiness of the people. Negotiations for the adjustment of some of the matters of difference resulted in the Convention which framed the Constitution. It was called for the purpose of proposing amendments to the Articles of Confederation; but it was soon admitted that the defects of the system were too great to be overcome in that mode, and that a radical change, constructing a government of



the general character of the State governments so far as the division and distribution of powers were concerned, but limited to the purposes for which a general government was needed, was the only effective remedy for existing evils. As the matter for consideration was one which was vital to the happiness and prosperity of the country, the several States sent some of their most prominent men as delegates to the Convention; and this august body continued in session nearly four months, forming and maturing the plan, and proceeding with the most praiseworthy care and caution. All matters in which a difference of opinion existed were fully debated and considered, and the several propositions were submitted to the "Committee of Detail," which not only revised, but carefully collated and arranged, the different parts of the proposed instrument.

When the work was completed, copies of it were furnished to the several States and to Congress, with a letter in which are these significant paragraphs, viz.: "It is obviously impracticable, in the federal government of these States, to secure all rights of independent sovereignty to each, and yet provide for the safety and interest of all." "In all our deliberations on this subject, we kept steadily in our view that which appeared to us the greatest interest of every true American, — the consolidation of the Union, — in which is involved our prosperity, felicity, safety, perhaps our national existence." Many persons feared that the powers proposed to be granted were too great, and that there was danger that the new government would swallow up the State organizations, the very thing of all others which it was not designed to accomplish. It underwent a most searching and critical analysis. Messrs. Hamilton, Madison, and Jay, in a series of papers (most of which were written by the two gentlemen first named) which have since been collected under the title of "The Federalist," and form a standard commentary on the Constitution, gave it a very powerful

support, and probably saved it from rejection.\* In several of the conventions of the people of the different States to which it was submitted for ratification, there were long debates upon its general character, and upon particular parts of it, and in many it was ratified by but small majorities, mainly from the fear, before suggested, that too much of the power of the States would be surrendered by its adoption.

This brief reference to the history of the formation and ratification of the Constitution may serve to show that we should hold fast to the government which it has provided, and abide by the constitutional obligations which it imposes upon us. Surely we cannot hope that more favorable circumstances will occur for the dispassionate formation of a new Constitution, or that the construction of such an instrument will be committed to wiser or more patriotic men. If the present government is subverted, either by a secession of parts or by a usurpation of powers belonging to the States, who shall assure us that the process of disintegration, or usurpation, once begun, will not end in the entire destruction of the republic?

It would seem, at first, that the general principles of an instrument which had been subjected to such an ordeal, and to such numerous and most able expositions, must by the time it was fairly adopted have been very fully understood. But it is quite evident that the subject was not exhausted.

The compendium of judicial decisions upon different parts of the Constitution, more particularly relating to the jurisdic-

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\* In the edition of this work now in the library of the Law School of Harvard College, some unknown and unauthorized annotator has entered, in pencil, immediately before the first number, this important piece of information, viz.: "This number was written by A. Hamilton, on a small writing-desk belonging to Mrs. Hamilton, and sent to her from England by her sister, whilst on his passage up the North River in a small sloop. The authenticity of this is indisputable. Any one asking to see the desk can be accommodated at Barnum's Museum. Price, 25 cents."

We print the note for the benefit of persons curious in such matters. They can doubtless find the locality indicated!

tion and practice of the courts, by Thomas Sergeant, was published in 1822. A second edition, under a slightly varied title, with additions and improvements, appeared in 1830.

The first edition of Mr. Rawle's "View of the Constitution" was published in 1825. This work is of a more general and speculative character. It is to be noted that in his final chapter, entitled, "Of the Permanence of the Union," the author, regarding the Constitution as a mere compact, — and without sufficient reference to the circumstances showing that, if it were regarded as a compact, it was indissoluble, constituting a government which was to be permanent, — distinctly admits the right of the people of a State to secede from the Union, and says that "secessions may reduce the number to the smallest integer admitting combination." But he impairs somewhat the force and effect of his own positions in this respect, when he says, in the same chapter: "We may contemplate a dissolution of the Union in another light, more disinterested but not less dignified, and consider whether we are not only bound to ourselves, but to the world in general, anxiously and faithfully to preserve it"; — adding, after a remark or two: "In every aspect, therefore, which this great subject presents, we feel the deepest impression of a sacred obligation to preserve the union of our country; we feel our glory, our safety, and our happiness involved in it; we unite the interests of those who coldly calculate advantages with those who glow with what is little short of filial affection; and we must resist the attempt of its own citizens to destroy it, with the same feelings that we should avert the dagger of the parricide." Probably we should feel ourselves authorized to "avert the dagger of the parricide" by a little wholesome coercion, sufficient to prevent the commission of the crime, and to inculcate upon him a seasonable lesson in regard to his rights and duties; and this is what we propose to do with the Secessionists, in the fulfilment of our "sacred obligation to preserve the union of our country."

In 1833 Mr. Justice Story published an elaborate treatise upon the Constitution, in three octavo volumes. The general course of the work is a statement of the different provisions of the Constitution, and of the decisions bearing upon it, with discussions upon the points which had been controverted or considered before that period. Many of the important cases founded upon the clause conferring upon Congress the power to regulate commerce, have arisen since its publication, and the greater portion of those involving the discussion of slavery also. An abridgment of it is used as a text-book for colleges and the higher schools. But the closing paragraph of a review of the work, in the July number of the *American Jurist* of that year, shows the reviewer to have been no prophet when he said: "The work is of the very highest importance, as bearing both upon legislation and upon jurisprudence, since it presents the subject of constitutional law so luminously before the community that it will be scarcely possible that any question henceforth arising on the subject should be superficially treated either in legislative debate or forensic argument."

The book of Mr. President Duer contains a valuable course of lectures upon the fundamental principles of the Constitution, and the powers of the federal government; but it is not our purpose to speak at large of its merits at the present time.

Somewhat of the character of the speech of Mr. Conway may be learned from a single paragraph which follows:—

"The wish of the masses of our people is to conquer the seceded States to the authority of the Union, and hold them as subject provinces. Whether this will ever be accomplished, no one can, of course, confidently foretell; but, in my judgment, until this purpose is avowed, and the war assumes its true character, it is a mere juggle, to be turned this way or that,—for slavery or against it,—as the varying accidents of the hour may determine."

The innumerable speeches, in Congress and out of Congress, within the last few years, may serve to show with what dili-

gence, if not with what success, constitutional law has been recently studied. If the speech-makers have not put the authors of the Federalist to shame, by their more recondite researches into the mysteries and rules of constitutional construction, they have at least shown that there may be expositions of the provisions of the Constitution of which Hamilton, Madison, and Jay never had any conception; and it is in the spirit of the extract from the speech of Mr. Webster quoted at the head of this article that we propose to set down in brief words certain propositions of constitutional law, having immediate reference to subjects which now agitate and convulse the country; — propositions which we think, in the language of John Quincy Adams on another occasion, “will stand the test of talents and of time.” We commend them to the special consideration of those who, having no selfish interest to subserve, and no passionate hostility to be gratified, are sincerely attached to the Constitution. To those who are desirous of subverting it, in some part, so as to subserve their own notions and purposes, some of them of course will be distasteful. We cannot expect to convince those who are predetermined against conviction.

The people dwelling along the western shore of the Atlantic Ocean, from the Bay of Fundy to the Territory of Florida, were organized as Colonies of Great Britain, thirteen in number, under charters, grants, and commissions, each being a distinct and separate colonial government, having its representative assembly, its executive, and judiciary, and no one having any right to interfere in the affairs of any other. In those Colonies slavery existed, regulated of course by the laws of the several Colonies, subject to the control of the British government.

A controversy arose between some of those Colonies and the mother country, in which they made common cause, and united for the common defence through the organization of a Congress of deputies, who acted at first, and mainly, through

recommendations to the people of the several Colonies, but made divers provisions for the common defence and for the carrying on of the war.

This Congress issued the Declaration of Independence, as the act of the people of the thirteen Colonies, in which their grievances were set forth; and it was solemnly published and declared, in the terms of a resolution previously adopted, "that these united Colonies are, and of right ought to be, free and independent states." In its introduction it speaks of those in whose behalf it is made as "one people." The Declaration asserted certain general political truths, without attempting to set forth the limitations, qualifications, and conditions to which the administration of human affairs, under diverse circumstances, must subject them. It has never been recognized as a constitutional Bill of Rights.

At the time of the Declaration, the new States were bound together by the previous union of the Colonies, through the organization of the Congress, and they continued so bound by the pledge of the Declaration itself, and by measures which were taken to effect a perpetual union under Articles framed for that purpose. The terms of such perpetual union were agreed upon and set forth in certain "Articles of Confederation and Perpetual Union between the States," which gave to Congress certain enumerated powers, partly legislative, executive, and judicial, but of a very limited and imperfect character. The last Article was in these words: "Every State shall abide by the determinations of the United States in Congress assembled, on all questions which by this Confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State." There

was no provision for a dissolution of the Union thus formed, and of course no right of secession from the Confederation.

These Articles limited and abridged the sovereignty of the several States, to the full extent to which they conferred powers upon Congress, and also by certain express provisions for that purpose. Several of the new States, from time to time, formed constitutions for their own government. This State action was, or became, subject to all the limitations arising under the Articles of Confederation, but subject only to those limitations. The general principles set forth in the Declaration of Independence are not admitted as limitations upon State authority. On the contrary, anything found in the State constitutions which may be supposed to conflict with the principles asserted in the Declaration, must be regarded as a limitation or qualification of those principles, required by the particular circumstances of the community forming its constitution,—that constitution being the supreme law of the State, except so far as it was limited and controlled by the provisions of the Articles of Confederation, and subsequently by the Constitution of the United States.

By the treaty of peace, Great Britain acknowledged the independence of the United States, and defined, or attempted to define, the boundaries between her and them. The general boundaries of the United States were the Atlantic Ocean on the east, the Spanish possessions on the south, the Mississippi on the west, and the British possessions on the north. Controversies which arose between some of the States respecting the vacant territory within the foregoing limits, lying eastward of and along the Mississippi,—some of which was claimed by several of them, while others contended that it should be regarded as a fund for the benefit of all,—were settled by the cession, by Virginia and other States, of the territory northwest of the Ohio River to the United States, and by other cessions. The present State of Vermont was claimed by New Hampshire and

New York ; and the inhabitants of that district contended for their right to admission into the Union as an independent State ; but the United States claimed nothing there.

The Articles of Confederation contained a provision by which Canada, acceding to the Confederation, and joining in the measures of the United States, was to be admitted into, and entitled to the advantages of the Union ; but no other Colony was to be admitted unless the admission was agreed to by nine States. There was no provision looking to the possible admission of any territory not a colony of Great Britain, and there was a provision that no State should, without the consent of the Congress, enter into any conference, agreement, alliance, or treaty with any king, power, or state.

The Ordinance of 1787, and conditions in the cessions of other territory to the United States, determined the *status* of all the territory belonging to the United States in regard to the admission of slavery. Northwest of the Ohio it was excluded by the Ordinance ; southwest, it was admitted by conditions in the cessions by North Carolina and Georgia. The policy of nearly all the States at this time was antislavery. Virginia voted for the Ordinance of 1787. She consented that the district of Kentucky should be formed into a new State, leaving the inhabitants to the freedom of their own will in that respect. There was no attempt to control the action of any State in reference to slavery within its own limits, nor any assertion of a right so to do.

The facts stated thus far show very clearly that there was no right on the part of any State, or of the people of any State, to control or interfere with slavery in any other State. Nor was there any power in Congress to regulate, or interfere with, the domestic institutions of any State. It is equally clear that there was no right, legal or moral, on the part of any State, or the people of any State, or any of them, to have slavery extended or diffused beyond the limits of such State, or to hold



slaves beyond State limits, except according to the conditions in the grants of territory by some of them to the United States. No State could, consistently with the Articles of Confederation, make any agreement for the acquisition of territory for that or any other purpose, nor was there any express provision for the acquisition of territory by Congress.

Under these circumstances, and contemporaneous with some of them, the Constitution was framed. It was designed to remedy defects which existed in the permanent and indissoluble union under the Confederation, and was declared to be the act of the people of the United States, for the purpose of forming a more perfect Union for themselves and for their posterity. It provides for the organization of a government complete in all its parts, legislative, executive, and judicial, — a sovereignty in form, as well as in effect, for all the purposes within the scope of its powers, — the chief of which powers are most emphatically for national purposes. And it confers upon the United States rights of sovereignty, to be exercised within the limits of the several States, which from their very nature cannot be revoked or resumed by a State, or the people of a State, or of any number of States, except by amendment of the Constitution or by revolution. From the terms of the instrument, from the nature of the government which it created, and from the rights thus granted, having the character of “*eminent domain*,” it is certain that there can be no right of secession.

The Constitution was adopted and ratified not by the people of the United States as a general community, for until its adoption there was no such community; and moreover by its terms it was, when ratified by the people of nine States, to be the constitution for those States. But it was ratified by the *people* of the several States, acting primarily, and not by State authority under the State constitutions; and by its adoption they became one people for the purposes therein specified. With some delay it was ratified by the people of all the States, and thus became the paramount law for all.

In construing the Constitution we must resort to the ordinary rules for the interpretation of laws. Its construction is not to be determined by what Mr. Hamilton, or others of his school, desired, or what Mr. Jefferson and his adherents, at a later day, contended had been accomplished. If such individual declarations may be adverted to, for the purposes of construction, they have but a limited significance. So far as the writings of Madison, Hamilton, and others, explaining their views of the meaning and operation of the different provisions, were diffused among the people before its adoption, the construction thus presented is entitled to great weight, unless there is something to control it, from the presumption that such was the received opinion of the time. Contemporaneous construction is of very high authority.

It is not proper to call the Constitution a compact. Its terms, its nature, and the powers granted by it, show it to be something more than a compact. If, however, it is to be regarded as a compact, this will not make any difference in relation to any of the main principles involved in present controversies. Regarded as a compact, it is a permanent one, constituting an indissoluble union, with powers of sovereignty which cannot be revoked or resumed. Whether construed as an organic law, or as a compact, therefore, it constituted a nation, for the purposes for which it was formed, leaving to the States or people the powers not granted, either expressly or by implication.

The provision of the Constitution defining what shall be regarded as treason against the United States shows, not only that the United States constitute a government, but that it is one to which allegiance is due. And the Constitution being the supreme law of the land, the allegiance due under it is the paramount allegiance.

The Constitution left slavery just as it found it, except in two or three particulars. It provided for an apportionment of

representation upon a certain slave basis; but this did not alter the *status* of the slave, or give Congress any power to change or modify it. It gave authority to Congress to prohibit the slave-trade after 1808, and this authority has been exercised. It imposed the duty of delivering up fugitive slaves. Constitutionally and legally speaking, it is as right that this duty should be performed, as it is that the power to prohibit the slave-trade should be exercised. Without the Constitution, neither the power nor the duty would have existed. The instrument which confers the one, equally imposes the other. To exercise the power, and refuse to perform the duty, is not merely unconstitutional; it is a fraud. All State laws, therefore, enacted with a design of evading the performance of the duty, are a violation of a constitutional obligation, and can neither be justified by law nor excused by any code of morals. The Constitution binds the United States, on application, to protect each State against domestic violence, which may include a servile insurrection; but this does not change the relation of master and slave.

Although the Constitution was formed for the States as then existing, and with reference to the territories then belonging to the United States, and their admission into the Union as States, and contains no direct provision anticipating the acquisition of territory, it is clear that, through the power to make treaties and war, territory may be acquired. Any territory thus acquired belongs to the United States. The United States acquire it, and not any State, or aggregation of States. There is no tenancy in common, and of course no partition. There is no trusteeship, for there is no interest, legal or equitable, in any State, nor any use. There are no shares, nor any distribution of proceeds, except at the election of the United States. The United States are no more trustees of territory acquired by conquest, than they were trustees of the army by which it was acquired; and the idea of such a trus-

teeship would be an absurdity too great for any theorist out of an insane asylum. The army by the action of which the conquest is made is the instrument of the United States; the treaty which secures it is made by the United States; the title vests in the United States; — and it follows, logically, that the acquisition is the property of the United States. The people of the United States, as a general community, have the benefit of it for the purposes for which the general government was formed. Such territory is therefore to be governed and disposed of for the benefit of the United States as a whole, and not with regard to the interests of any one section.

If there is any provision in the Constitution for the government of such territory, it is in the general clause empowering Congress “to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States.” It would seem that this clause was not intended to apply to subsequently acquired territory, because the Constitution did not contemplate and make provision for such acquisition. Whether it was intended to apply or not is immaterial, for Congress, as the legislative department, must necessarily exercise such a power.

If it is for the interest of the whole community that slavery should exist in any Territory, Congress may permit it, and there is no power elsewhere to control the action of Congress allowing its existence. If it is not for the interest of the whole, the legislation of Congress excluding slavery, during the continuance of the territorial government, is equally conclusive. A territorial legislature can possess no power except such as is conferred by Congress.

The Supreme Court have no authority, under the Constitution, in relation to subsequently acquired territory, until Congress shall extend the jurisdiction of the court over it. The attempt by six judges of that court to control this subject by a judicial decision, was a gross usurpation, for which impeach-

ment and removal would have been but a just punishment. The Constitution itself does not extend over such territory. It was made for States, not Territories. It extends the right of legislation by Congress over such territory, either by the express clause authorizing Congress to make rules for the Territories, or through the power of legislation granted to Congress, which is the only power applicable to territory thus acquired, until legislation has brought into exercise the powers of the other departments; — except that territory acquired by conquest may be governed by the military power which made the acquisition, until such legislation is had. This shows clearly that the Supreme Court has no power there, except through and under legislation for that purpose.

The Constitution having made no express provision for the acquisition of territory outside of the limits of the United States, as established by the treaty of peace in 1783, the clause respecting the right of Congress to admit new States cannot rightfully be construed to apply to such territory. But if Congress, having the power of legislation, passes an act admitting a State, and the people of the State come in under such act, neither the executive nor judicial department can control and negative such admission. If such State is a slave State, it will not constitutionally be entitled to a representation on the slave basis; but here again, if Congress make an apportionment upon that basis, no other department can gainsay it.

The Constitution empowers Congress to declare war; to grant letters of marque and reprisal; to raise and support armies; to provide for calling out the militia to execute the laws of the Union, to suppress insurrections, and to repel invasions. And it provides that the United States shall guarantee to every State in the Union a republican form of government. The authority and duty to suppress an insurrection are to be exercised in aid of the legitimate State authority, as well as for the assertion of the authority of the United States. It is

as much the duty of the United States to intervene in aid of a State, and suppress an insurrection, when an attempt is made to subvert the State authority, or when there is a usurpation of the State authority, as it is to suppress an insurrection, the object of which is to subvert the authority of the United States.

The United States have no authority to emancipate the slaves in any State, except as it may be done in the suppression of an insurrection. The persons who rebel may be punished through their property, and in determining what is to be regarded as property, reference may be had to the laws of the State in which the offence was committed. The confiscation of slaves may, therefore, be a part of the punishment inflicted for such offence.\* But this punishment of confiscation, so far as it is a

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\* A writer in a Boston daily paper, under the signature of G. T. C., attempts to maintain that there can be no confiscation of slaves as a punishment for treason, except for the life of the master. In support of this, he cites the clause of the Constitution in these words: "The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted." He proceeds to say that "the term attainder, as here used, is synonymous with judgment or conviction; a sense in which it was used at the common law, where the judgment of guilty was to be followed by forfeiture of lands or goods, to be reached by a subsequent process claiming the property of the convicted or attainted traitor for the king." This shows, on the part of the writer, a great confusion of ideas in regard to conviction and judgment, which, in relation to this subject-matter, are entirely distinct; and also in regard to the forfeitures which were peculiar to each. There is, by reason of this confusion, a mistake in regard to the import and effect of the constitutional provision, and a misapprehension respecting the character of an attainder, and the consequent forfeiture. By the attainder mentioned in the clause of the Constitution above cited is undoubtedly meant the attainder which results from a judgment at the common law, and not a bill of attainder by a legislative enactment. The writer proceeds to say, in a subsequent paragraph: "Suppose you forfeit the slaves of A for treason. If you mean to obey the Constitution, whatever extent of estate A had in those slaves, you can take only an estate for his life." Again: "On the termination of A's life, his heirs or his creditors have a title in those slaves, which they can assert, if there are any tribunals in the land to administer the law and the Constitution."

We were somewhat surprised by these latter propositions, but they are correct *if the writer can only show that slaves are real estate at the common law.* The attainder spoken of in the clause cited from the Constitution being such attainder as,

civil punishment, must be meted out, in the same manner as other punishments are, by general laws for trial, conviction, and judgment. There is no more authority to declare, by a general law, that the slaves of all rebels shall be free, without provision for a trial of the treason, than there is to declare, summarily, by a similar law, that all rebels shall be hanged, without any provision for a trial.

The military commander has no authority to emancipate the

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according to the common law, results from a judgment, it seems clear that the forfeiture, which is limited by the Constitution to an estate for life, relates to the same general kind of property which was forfeited by the attainder at common law; and the language of the constitutional provision indicates that this was real, and not personal property. A forfeiture of a life estate in personal property, of which the traitor had the absolute title, would certainly be an anomaly. But it is clear that the forfeiture on attainder of treason was of real property only, lands, and interests in or rights to lands, and could be no other; for the forfeiture of the personal property of the traitor was the result of the conviction, which preceded the judgment and the attainder. To ascertain this we need go no further back than Blackstone's Commentaries, from which we make two or three extracts.

"When sentence of death, the most terrible and highest judgment in the laws of England, is pronounced, the immediate inseparable consequence by the common law is *attainder*. For when it is now clear beyond all dispute that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society, the law sets a note of infamy upon him, puts him out of its protection, and takes no further care of him than to see him executed. He is thus called *attaint*, *attinctus*, stained or blackened. He is no longer of any credit or reputation; he cannot be a witness in any court; neither is he capable of performing the functions of another man, for, by an anticipation of his punishment, he is already dead in law. This is after *judgment*; for there is a great difference between a man *convicted* and *attainted*, though they are frequently, through inaccuracy, confounded together. After conviction only, a man is liable to none of these disabilities, for there is still in contemplation of law a possibility of his innocence."

"The consequences of attainder are forfeiture and corruption of blood. . . . Forfeiture is twofold; of real and personal estates. First, as to real estates. By attainder in high treason a man forfeits to the king all his lands and tenements of inheritance, whether of fee simple or fee tail, and all his rights of entry on lands and tenements which he had at the time of the offence committed," &c., "and also the profits of all lands and tenements." — 4 Blackstone's Commentaries, 380, 381.

"There is a remarkable difference or two between the forfeiture of lands, and of goods and chattels. Lands are forfeited upon *attainder*, and not before; goods and

slaves except as a part of his military operations, and these cannot extend beyond the actual power of the force under his command. His mere proclamation of emancipation, as a means of suppressing the insurrection, is entirely nugatory. So far as his military array extends, so far martial law prevails, and martial law supersedes, for the time being, the municipal law, in those particulars in which there is a conflict between them.

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chattels are forfeited by *conviction*. Because in many of the cases where goods are forfeited there never is any attainder, which happens only where judgment of death or outlawry is given; therefore in those cases the forfeiture must be upon conviction or not at all; and being necessarily upon conviction in those, it is so ordered in all other cases, for the law loves uniformity." — 4 Blackstone's Commentaries, 387. See also Coke on Littleton, 391 a; Hawkins's Pleas of the Crown, Book II. Chap. 49; 1 Chitty's Crim. Law, Chap. 17; 1 Meeson and Welsby's Rep. 148; Webster's Dict., Attainder.

It appears, however, that G. T. C. regards slaves as real estate, for in a subsequent paragraph he writes thus: "What I have now suggested supposes only the simple case of a slave owned *in fee*, and unencumbered by the rebellious master, whose life estate is all that can be forfeited to the United States, while the reversion most plainly belongs to his heirs."

One instance, perhaps more, may be found in which slaves were declared to be real estate; but this was for the purpose of descent, dower, &c., and even in that instance they had in law many of the attributes of personal estate. 1 Monroe's Reports, 28. If property, they are from their very nature personal property. In *Vol. III. of the United States Digest, compiled by George T. Curtis, Esq., tit. Slaves, I.*, decisions are collected showing that they are personal estate, as follows, viz.: "In Virginia, slaves are held as chattels, and are assets in the hands of an executor. *Walden v. Payne*, 2 Wash. 1." "Slaves properly come under the appellation of 'personal estate' in attachments. *Plumpton v. Cook*, 2 A. K. Marsh. 450." "They are within the operation of the statute of frauds, respecting loans of 'goods and chattels.' *Withers v. Smith*, 4 Bibb, 170."

A slave has a personal character when he is indicted for murder. He is not real property when any one is indicted for the murder of him. He is neither a fee nor a freehold when he runs away and his master claims him as a fugitive. And, upon quite as strong reasons, he is not real estate, with a reversion to his master's heirs, upon a forfeiture for treason.

The Constitution does not limit the power of Congress in relation to the common-law forfeiture which accrues upon conviction, nor to any forfeiture of personal estate.



If, under the operation of martial law, the duty which the slave, under the State law, owes to his master, is terminated for the time being, and the slave avails himself of such emancipation to secure his freedom, by a transit to a free State, the clause of the Constitution relative to fugitives from service cannot rightfully be invoked to enforce a return, because it is not applicable to the case of slaves whose duty of service is terminated, and whose masters have thereupon lost all custody and control over them. When the master ceases to provide for the slave, he may provide for himself. If the master has any claim, it is upon the government, whose military operations terminated the relation between him and his slave for the time being, so that the slave was left at liberty. A rebel master could maintain no such claim. If a master abandons the control of his slave, and he avails himself of his liberty, he cannot rightfully be sent back under the constitutional provision. But in either case, if the slave remains, and the martial law ceases, or the master, in case of his flight, returns and resumes his control, the emancipation will probably be a temporary one ; — as no right to freedom could afterward be asserted under the laws of the United States. The operation of the martial law would be only temporary upon the subject-matter, and would not, under such circumstances, effect a permanent emancipation.

It is no part of the duty of the commander or officers of a military force to assist the people of any State into which that force may enter in maintaining the possession of their slaves, any more than it is their duty to aid them in holding any other species of property, or other servants. On the contrary, the commander may require the services of the slaves in the suppression of the insurrection, in all cases where he could require the aid of persons or property for such service. And this extends even to placing arms in their hands, and using them as a part of his military force, if the exigency of the case

require it; of which he must judge, as he judges of other modes of conducting the war in the suppression of the rebellion. Whether the master will have a claim upon the government for indemnity must depend upon the circumstances of each particular case.

A State is, or can be, foreign to the United States, only by a successful revolution. It cannot be made foreign, under the Constitution, either by the people of the State, or by the action of Congress, or by that of the armies of the United States.

The power to declare war and grant letters of marque and reprisal cannot be exercised against a State, and the United States and a State cannot be brought into antagonism, consistently with the Constitution.

No *State*, as such, can be in insurrection. The people of a State, or a portion of them, may rebel, and civil war may ensue.\* The rebels may usurp State authority, either by the

\* Perhaps in this connection we ought to pay "the cold respect of a passing glance" to what appeared as an editorial in a Boston daily newspaper, assailing our article respecting Habeas Corpus and Martial Law, in the number for October, 1861.

There is a kind of argumentation in which we are not inclined to participate, and for which we have no respect, since it consists in grave misstatements of the positions maintained by others, followed by an attempt to controvert the positions thus assumed for them.

The writer of that editorial placed himself beyond the pale of fair discussion when he said: "The return to the writ, a copy of which is before us, presents only the naked question whether *the President of the United States can suspend the writ of habeas corpus without an act of Congress? The Reviewer says he can do so in time of war.*" Again: "If the Reviewer means to assert, as we presume he does, that any or all of these things constituted a state of war in legal acceptance in the *State of Maryland, so that all its citizens were under martial law, as the Reviewer defines it*, he means to assert a proposition which he would have done well to have supported by some show of argument." And again: "According, then, to this Reviewer, a proclamation of the President, (Congress not being in session, and no war foreign or civil declared by them,) calling out the militia to suppress an insurrection in certain States, *places every other State, in which any portion of those forces may happen to be moving or resting, under martial law, as defined by the Reviewer himself; or, in other words, it creates a state of war throughout the country, where there are any such troops*

complicity of those who held office under the State, or by turning them out, and placing others in their stead. But the war will be between the insurgents and the government. The State cannot commit treason, any more than a county or a

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*even in transitu.* This doctrine rests for the present on the authority of the North American Review."

The first of the above extracts certainly presents itself as a very gross misrepresentation when taken in connection with a paragraph contained in an extract from our article in the editorial itself, and which the writer therefore must be presumed to have read. It is in these words: "*Whether the President possesses the power to order or authorize it [the suspension of the writ of habeas corpus] as an incident to his office of Commander-in-Chief of the army and navy, or whether he has it as an incident to his duty to see the laws faithfully executed, we do not propose to inquire.* The opinion of the learned Attorney-General upon the latter point is already before the public, and *we do not deem the settlement of those questions necessary to our present purpose.*" And in accordance with the statements thus made, we carefully forbore to express any opinion upon that subject, arguing the right of General Cadwalader to refuse to produce Merryman upon other and entirely different grounds, saying that, "in time of actual war, whether foreign or domestic, there may be justifiable refusals to obey the command of the writ without any act of Congress, or any order or authorization of the President, or any State legislation for that purpose; and the principle upon which such cases are based is, that the existence of martial law, so far as the operation of that law extends, is, *ipso facto*, a suspension of the writ."

Then, again, in relation to the statements that we maintained that *all the citizens of Maryland were under martial law*, or even that *war existed there*, and that calling out the militia to suppress an insurrection in certain States *places every other State, in which any portion of those forces may happen to be moving or resting, under martial law*, there is not the least possible excuse for such a misrepresentation. Having come to the conclusion that the existence of martial law, so far as it extends, operated as a suspension of the writ, we proceeded to the question, "Was martial law in existence at Fort McHenry at the time when the writ was issued and the return made?" We neither inquired whether all the citizens of Maryland were under martial law, nor indicated an opinion that they were so. Nor did we imply that martial law existed when and where Merryman committed the acts, whatever they were, for which he was arrested. We stated our position in these express words: "Now, it may, we think, be laid down as a safe principle, that in time of war any fort or camp occupied by a military force, for the purposes of the war, is *ipso facto*, without any special proclamation, under the government of martial law, such as we have described it. And the same, in our opinion, as at present advised, is equally true of any column of soldiers mustered into active service for the like purpose, whether on the march or at rest. It is not necessary to speak of soldiers mustered

city in a State commits treason, when the people of that county or city rise in insurrection. The analogy between a State and a county or city holds good thus far, although it may not in some other respects. There can of course be no punishment

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into the service of the government, but stationed at a distance for the purpose of being called into active service when occasion may require. They may, or they may not, be under government of military law only, as in time of peace. But this cannot be said of troops actively engaged in the service of the government. Whether those troops are in the face of the enemy in battle array, or whether they are merely garrisoning a fort *to aid thereby* in suppressing a rebellion, or whether they are opening and holding the avenues by which the passage of other troops to the theatre of active war is to be facilitated, the law which governs *the place where they are* is martial, and not municipal."

This character of misrepresentation runs through the paper so far as it relates to our article; but we do not propose to follow this matter further. Our inducement to refer to the paper at this time was what seemed to be the course of its argument: that there was no "war," because war had not been declared by Congress. In one of the paragraphs above quoted, we find, "Congress not being in session, and *no war foreign or civil declared by them.*" In another paragraph the writer says: "From beginning to end the article reiterates, through forty-seven pages, that there was a 'state of war,' a 'time of war,' and an 'existence of war.' . . . . But the whole of this is the *ipse dixit* of the Reviewer." Again: "No one can fail to see how serious must be the doubt whether any proclamation of the President can create a state of war, and bring into exercise all the laws of war, where no war foreign or civil *has been declared by Congress.* If the suppression of a rebellion, however extensive, comes within the *war power* of the federal government at all, in the strictly legal sense of that power, it is clear that Congress alone can exercise that power under the Constitution."

Now, as the United States cannot declare war against any State of the Union, and as war is not usually declared against an insurrection, or against insurgents, and we may safely conclude never will be so declared by Congress, the conclusion seems to follow that we cannot have a civil war in the United States. What is now going on along the coast at different places, — in Albemarle Sound, Kentucky, and Tennessee, — is not war! It is only fighting! Great Britain, France, and Spain have acknowledged the Confederates as belligerents; but that does not constitute the contest a *foreign war*. And so, according to the editorial, there are two belligerents without any war.

But we are not without authority on this subject. See the case of "The Tropic Wind," decided by Judge Dunlop, U. S. District Court for the District of Columbia, June Term, 1861; in which his Honor said, referring to the President's proclamation: "These facts, so set forth by the President, with the assertion of a

of a State for treason, or other offence, and the proposal in Congress to confiscate State lands is unconstitutional. The persons who offend may be punished, as we have seen, either personally or through their property.

A civil war cannot, on the part of the government assailed, be a war of conquest. The territory in which it is waged being one which belongs to the government, or over which the government has jurisdiction, it cannot be added to the existing government, to which it already belongs, by any military operations in suppression of the rebellion. This is as true in relation to the United States, and the several States, as it is of any other nation or government; for although the territory comprised in the several States is not the property of the United States, and the United States do not own the several States, the States are all component parts of the United States; the government of the United States has jurisdiction over all the States,—rights of eminent domain there,—rights to hold

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right of blockade, amount to a declaration that civil war exists." See also the case of "The Amy Warwick," decided by Judge Sprague, U. S. District Court for the District of Massachusetts, February, 1862, where the learned Judge disposed of the matter in this wise: "As the Constitution gives Congress the power to declare war, some have thought that, without previous declaration, war in all its fulness, that is, carrying with it all the incidents and consequences of a war, cannot exist. This is a manifest error. It ignores the fact that there are two parties to a war, and that it may be commenced by either. . . . How this civil war commenced, every one knows. . . . This was war,—open, flagrant, flagitious war; and it has never ceased to be waged by the same confederates with their utmost ability. Some have thought that, because the rebels are traitors, their hostilities cannot be deemed war, in the legal or constitutional sense of that term. But without such war there can be no traitors. Such is the clear language of the Constitution."

The editorial admits that Chief Justice Taney had judicial knowledge of the proclamation. On these authorities, then, he had judicial knowledge of the existence of war; and he was of course put upon the inquiry whether he could require the military commander of Fort McHenry to come out of the fortress in time of war, and bring a prisoner before him. The return that the President had suspended the *habeas corpus* pressed that inquiry upon him, whether the President could or could not suspend the writ.

courts, and enforce judicial proceedings; is under a duty to protect the State, not only against foreign powers, but against its own citizens; and guarantees to each as a State a republican form of government.

It is an absurdity of the first water to affirm that with such existing relations the United States can make war upon a State, conquer it, and reduce it to a territorial condition, consistently with the Constitution. If the citizens of a State rebel, the United States have express power under the Constitution to suppress the insurrection. But this neither increases the power of the United States over the State, so as to authorize a war of conquest, nor relieves the United States from the performance of their constitutional duties to the State and its citizens. Nor does it deprive the State of its State rights under the Constitution.

The Constitution secures to each State the right to two Senators in Congress, and a due proportion of Representatives. Under these provisions Mr. Johnson holds a seat in the Senate, as a Senator from Tennessee, and Mr. Maynard a seat in the House, as a Representative from the same State, notwithstanding the vote of secession by people of that State, and the rebellion there, which through military force has usurped the State authority, and subverted the authority of the United States; and notwithstanding the representation, nominally, of that State in the Confederate Congress. The insurrection, therefore, has not vacated their seats, and certainly the suppression of it cannot do so. If the insurrection were a State insurrection, the representation in Congress would be a rebellious representation, and could not constitutionally exist. If it is not a State insurrection, the suppression of it cannot be conquest, nor change the rights of the State or of its loyal citizens.\*

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\* Several of the seceding States owe debts to a large amount. Conquest, and the subjugation of the State to a territorial condition, must be a practical extinguish-

When the insurrection is suppressed, the Constitution and laws will remain for the government of the State as they existed before the insurrection, except so far as they have been changed by the legitimate action of the State authority during that period, or by revolution in the State, assented to by the United States. Virginia may find that she has lost Western Virginia, if the State organization there existing has adopted, or shall adopt, the proper means for a *division* of that State.

Some act may be necessary for the election of officers, in order to the resumption of the legitimate State authority in those States where it has been entirely subverted ; until which time there may be a military occupation. Whether that must be the act of the people of the State, or whether the United States, having suppressed the insurrection, may proclaim that fact, and call upon the people to assemble on a day named for the election of State officers, is a problem which may remain for solution until the time for its practical determination. That time will arrive, if we are faithful to the Constitution. It may never come if there is success in the attempt to subvert the Constitution by making the war one for the conquest of the Southern States, and their reduction to a territorial condition, in order to emancipate the slaves. If the war should take that character, it may lack the support necessary to bring it to a successful conclusion.\*

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ment of the debts as against the State; because the State would no longer exist. Would the Territory be substituted as the debtor? No, for it is not the legitimate successor of the State; and moreover it would have no means of payment. Are the United States to assume these debts as a part of the expenses of the war? If not, the creditors, domestic and foreign, have some interest in this matter. Perhaps Great Britain might be disposed to inquire upon what constitutional principle the debts due to her subjects had been extinguished through *the conquest, by this country, of a part of itself!* She could make a better case on that than she had on the seizure of Mason and Slidell.

\* Perhaps the country is in more danger, at the present time, from Presidential aspirants, and the intrigues of their adherents, than from the Confederate armies.

Constitutional and unconstitutional propositions press upon us with such rapidity at the present day, that, before we have time to dispose of one set of them, another claims our attention. We commenced this article with the intention of presenting some views respecting the difference between the Declaration of Independence and the Constitution, and between the Articles of Confederation and the Constitution, and with the design of stating a few plain rules respecting the construction of the latter instrument, and of some of its provisions, — particularly intending to show that it did not confer authority to emancipate slaves by proclamation, or act of Congress, or by the operation of martial law, except as martial law might give practical emancipation in places which were occupied by the military force of the government in the suppression of the insurrection. But before we have time to make up a record on this last point, which but a few days since seemed to be the main point of those revolutionists who seek emancipation at whatever cost, — presto! the position that martial law can emancipate all the slaves, if not abandoned as entirely untenable, seems to be left behind as useless, and a new constitutional theory is put forth in the House of Representatives by the member from Kansas; to wit, that the United States must conquer the rebellious States, and hold them as Territories, in which condition Congress could govern them at pleasure, and thus effect the work of emancipation.

It seemed as if only a few words were necessary for the refutation of such a notion, but the ink with which those words were written is hardly dry, when we have a most elaborate set of resolutions introduced into the Senate by Mr. Senator

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If officers are to be checked and snubbed for fear they should be too popular, and thereby become dangerous Presidential candidates, it is about time to bring some of the commanders now in Missouri and Tennessee into suspicion, and there should also be a good look-out in the direction of Albemarle Sound and Port Royal, as well as across the Potomac.



Sumner, the title of which we have added to the list of works at the head of this article. The resolutions are nine in number, and introduced by three recitals. Coming in the form of legal propositions and logical deductions, evidently prepared with great care and elaboration, and presented by one who is not only bound by official position to uphold and sustain the Constitution, but who would not be willing to be deemed other than a sound constitutional lawyer, these resolutions seem to claim a more extended notice than we have thus far given to this part of our subject. They contain the legal argument which is logically to reach the constitutional conclusion. We shall not find it necessary, however, to examine each of them in detail, as the basis of the whole is in the first three of them, or rather in the first and third. The first is in these words: —

“1. *Resolved*, That any vote of secession, or other act by which any State may undertake to put an end to the supremacy of the Constitution within its territory, is inoperative and void against the Constitution; and when sustained by force, it becomes a practical *abdication* by the State of all rights under the Constitution, while the treason which it involves still further works an instant *forfeiture* of all those functions and powers essential to the continued existence of the State as a body politic, so that, from that time forward, the territory falls under the exclusive jurisdiction of Congress, as other territory; and the State, being, according to the language of the law, *felo de se*, ceases to exist.”

The inconsistency, incongruity, and illogical conclusion of this first resolution are quite astonishing. It begins by asserting “that any vote of secession, or other act by which any State may undertake to put an end to the supremacy of the Constitution within its territory, is inoperative and *void* against the Constitution.” But this is followed up immediately by the assertion that when such void act is “sustained by force, it becomes a practical *abdication* by the State of all rights under the Constitution.” That is to say, an act pro-

fessing to be an act of secession, but entirely *void*, when sustained by force, is a surrender of all the rights which the State lawfully held before the void act and the force and support of it. This is certainly giving to such a *void* act a very comprehensive effect. As a general rule, a void act neither vests nor divests anything; and a void act sustained by force is no more effective for such purposes than any other void act. Certainly the conclusion is inevitable, that an act "*void against the Constitution*" leaves the Constitution legally operative just as it was before. If the Constitution was legally operative before upon a State and the people of a State, prescribing rights and duties, it is still legally operative in relation to the State and people, a *void* act to the contrary notwithstanding.

But this is not all. The resolution goes on to declare further, that the treason which it (to wit, this void act) involves "works an instant forfeiture of all those functions and powers essential to the continued existence of the State as a body politic." Now, it may be admitted that an act void so that it does not change the legal *status* of the party who does the act as to the party against whom it is done, may nevertheless be an illegal act, subjecting the first party to punishment. The act of insurrection, which is void so far as the attempt to throw off allegiance is concerned, is an illegal act, and may be treason, for which the rebel may be punished. But treason does not work any *instant forfeiture*, nor any *forfeiture*, legally speaking, of the "functions and powers essential to the continued existence" of the party committing it. Through legal process, a conviction of treason might work a forfeiture of the rebel's goods and chattels; and a judgment founded on the conviction, operating as an *attainder*, might work a forfeiture of his lands, or, under the Constitution, of a life-estate in them. And in the execution of a sentence of death, his life may be taken, and "the functions and powers necessary to his continued existence" will thereby cease; but this is by the *hanging*, and not by the "forfeiture."

Again, a *State* does not commit treason, and therefore all forfeiture founded upon treason must fail of any application to a *State*.

But the most astounding part of this resolution is its logical conclusion,—“so that from that time forward the territory falls under the exclusive jurisdiction of Congress as other territory, and the *State* being, according to the language of the law, *felo de se*, ceases to exist.” This certainly indicates a relation of the United States to the several States which the authors of the Federalist, and all the commentators on the Constitution, and the great jurists, Mr. Pinkney and Mr. Webster, who have successively been denominated the Defenders of the Constitution, never dreamed of. It is a well-settled principle of the common law, that, upon a forfeiture for crime, the thing forfeited goes to the Crown, or to the lord paramount, as the case may be. If, then, Mr. Senator Sumner’s is a logical conclusion, it must be because Congress, or the United States, is the sovereign or lord paramount of the several States. But we have never before learned that the States held their right over the territory within their limits by grant of Congress, or of the United States. We know that the States first came into existence; that the Congress of the Confederation held its powers from them; that the Congress of the Constitution holds its powers from the people, acting by States, and thereby becoming one people for the purposes of the government organized under the Constitution,—leaving to the States and people what was not granted either expressly or by implication;—so that the reverse would be true, to wit, that if Congress or the United States should forfeit their powers, they would revert to the States, or the people of the States.

Again, the resolution closes by the assertion that the *State* “being, according to the language of the law, *felo de se*, ceases to exist.” But the former part of the resolution asserted that

the act done by the State was void ; and, moreover, that the void act was treason. How is it that a void act is suicide ; or that a party who commits treason thereby takes his own life ? And how is it that the dead body of this remarkable suicide falls under the jurisdiction of the United States, in a different form of existence, for the purpose of government ?— Ah ! we understand. By a political metempsychosis the territorial soul enters into the dead body of the State which has just cut its own throat. — No ! we are at fault there again. This might answer for Louisiana, and Mississippi, and Florida, and Arkansas, which once had a territorial existence ; but where are the Carolinas, and Georgia, and Texas, which have never existed as Territories, to get these territorial souls to reanimate their dead State bodies ?

It will not do to say that Mr. Sumner's resolution is not to be understood literally ; that, when he speaks of the treason of a State, it is by a kind of analogy, and figuratively ; for if his treason is figurative, his forfeiture must be figurative, and his conclusion figurative ; so that the State will become a Territory merely figuratively and rhetorically, the jurisdiction of Congress over it will be merely imaginary, and the *felo de se* will be but an apparition of a dead State, instead of a veritable *corpus delicti*.

The second and third resolutions may be considered together. They are as follows :—

“ 2. *Resolved*, That any combination of men assuming to act in the place of such State, and attempting to ensnare or coerce the inhabitants thereof into a confederation hostile to the Union, is rebellious, treasonable, and destitute of all moral authority ; and that such combination is a usurpation, incapable of any constitutional existence, and utterly lawless, so that everything dependent upon it is without constitutional or legal support.

“ 3. *Resolved*, That the termination of a State under the Constitution necessarily causes the termination of those peculiar local institutions

which, having no origin in the Constitution or in those natural rights which exist independent of the Constitution, are upheld by the sole and exclusive authority of the State."

The terms in which the second is expressed are well enough. But in its application to the subject-matter it is emphatically inconsistent with the first. We can hardly argue this without repetition. The insurrection at the South is truly a combination of men who assume to act in the place of certain States, and who have ensnared or coerced many of the inhabitants into a confederation hostile to the Union. This combination is rebellious, treasonable, destitute of all moral authority, a usurpation, — and everything dependent on it is without constitutional or legal support. But it is attempted to support the combination by force. On the supposition that this unconstitutional, utterly lawless usurpation could succeed in severing any State from the Union, the result would be that the laws and authority of the United States would no longer be in force there. But so far as the combination had not seen fit to change the State constitution or the local laws, the State organization and local institutions would remain in force. In other words, the termination of a State under the Constitution causes only the termination, prospectively, of those rights and duties which exist under the Constitution; and in nowise affects its local institutions, which exist under the State government.

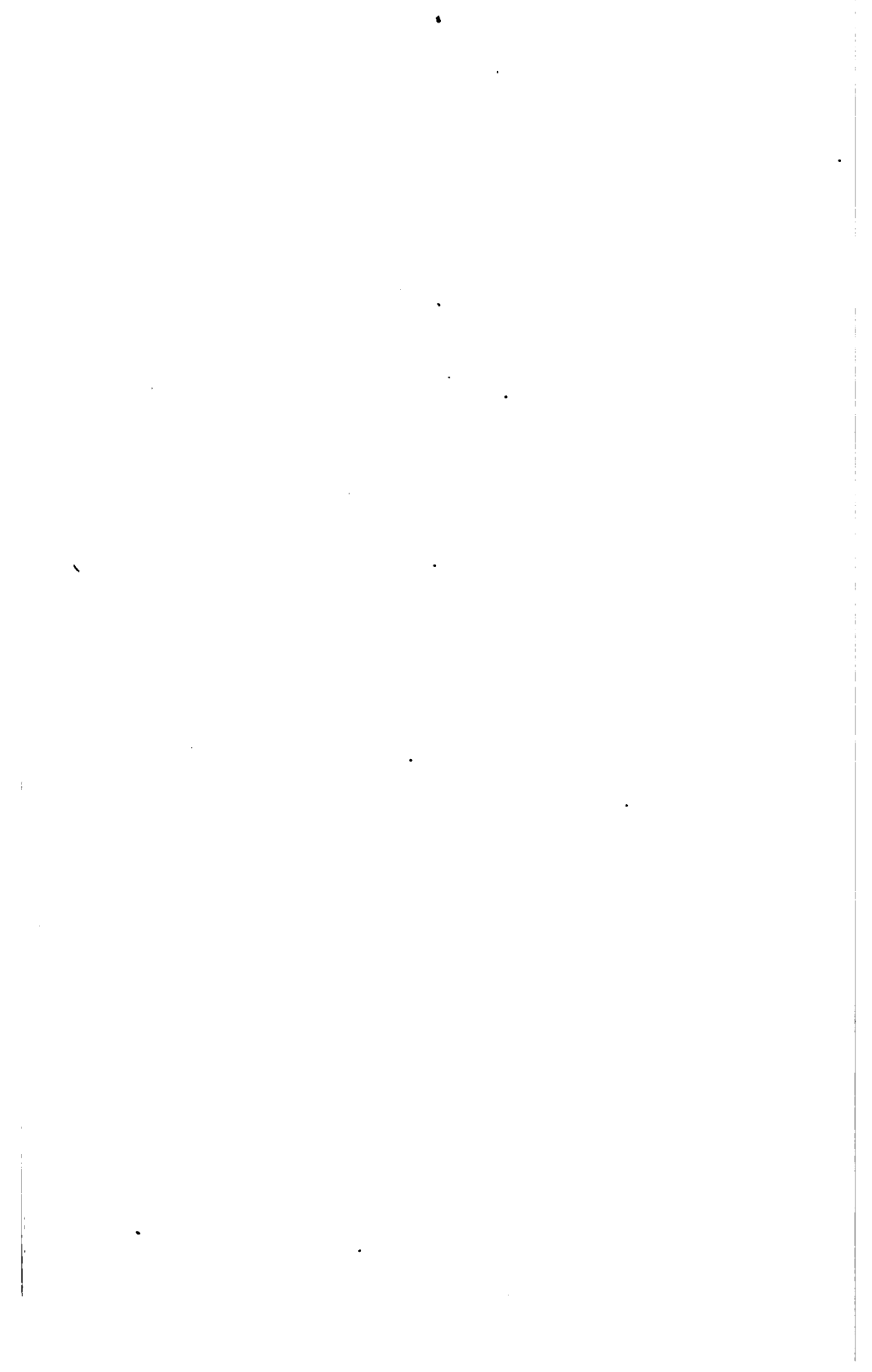
On the other hand; if the combination fails of success in its usurpation and rebellion, — if the force is overcome, and order restored, so that everything dependent upon the attempt was not only without constitutional or legal support, but has no longer the support of force, — it must require some new rules of logic to show how the attempt, which was legally powerless from the first, and has become practically powerless at last, has had the effect, not only to change the political relations of the State to the United States, but to subvert the constitution and

laws of the State itself, — so that even the loyal people there are deprived of all the political and legal rights which they held under the constitution and laws of the State.

The righteous, successful revolution by which the people of the Colonies threw off their allegiance to Great Britain did not change the local laws. Clearly, if the attempt had been unsuccessful, it would not have abrogated the laws respecting the domestic relations, — not even those which governed the “peculiar institution,” which then existed in all the Colonies.

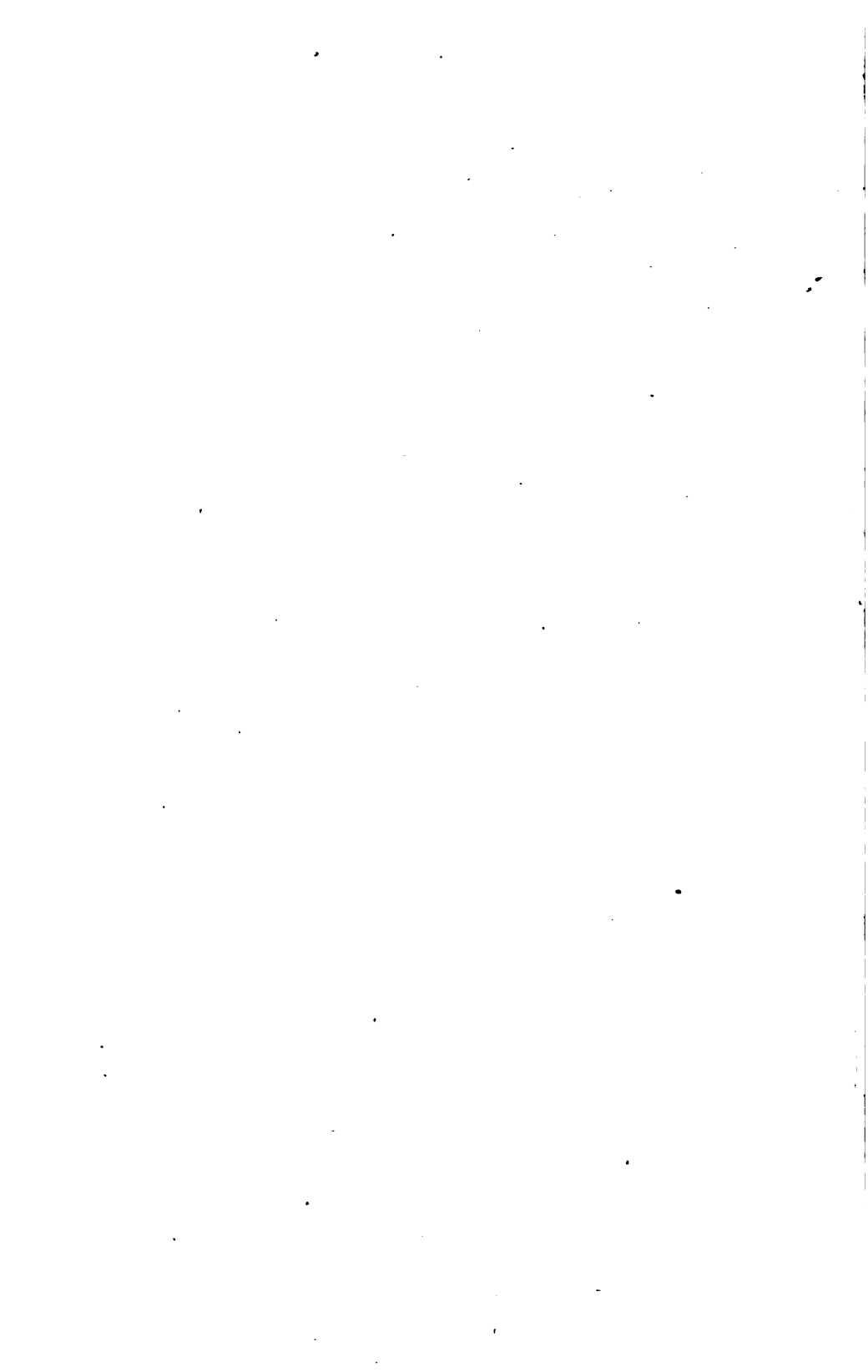
If it shall be found, on the suppression of the rebellion, that there are not loyal citizens enough in any State to uphold a State government, with the aid of the United States, then a new case will be presented, which may, from necessity, require an extraordinary remedy. In the mean time, it is to be hoped that disloyalty will not become more general by reason of threats of conquest, or by propositions that the United States shall become *administrator de bonis non* of the seceding States.

One description of treason against the United States consists “in adhering to their enemies, giving them aid and comfort.” Mr. Conway and Mr. Sumner have given the “aid and comfort.” Had they sent in their *adhesion* at the same time, they would have done the Union much less mischief.























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